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July 16, 2004

Via Hand Delivery

Beth O'Donnell, Esq.
Executive Director
Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40601

RECEIVED
JUL 16 2004
PUBLIC SERVICE
COMMISSION

RE: Case No. 2003-00143

Dear Ms. O'Donnell:

I deliver herewith the original and six copies of a Brief on behalf of Logan Telephone Cooperative, Inc.; Mountain Rural Telephone Cooperative Corporation, Inc.; Peoples Rural Telephone Cooperative Corporation, Inc.; South Central Rural Telephone Cooperative Corporation, Inc. and the Independent Telephone Group for filing.

Very truly yours,

STOLL, KEENON & PARK, LLP

By

Lindsey

Lindsey Ingram, Jr.

/sl

Encs.

cc: Counsel of Record

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**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

RECEIVED

JUL 16 2004

PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

PETITION OF NPCR, INC.,)	
D/B/A NEXTEL PARTNERS FOR)	CASE NO. 2003-00143
DESIGNATION AS AN ELIGIBLE)	
TELECOMMUNICATIONS CARRIER IN)	
THE COMMONWEALTH OF KENTUCKY)	

**BRIEF OF LOGAN TELEPHONE COOPERATIVE, INC.;
MOUNTAIN RURAL TELEPHONE COOPERATIVE CORPORATION, INC.;
PEOPLES RURAL TELEPHONE COOPERATIVE CORPORATION, INC.;
SOUTH CENTRAL RURAL TELEPHONE COOPERATIVE CORPORATION, INC.
AND THE INDEPENDENT TELEPHONE GROUP¹ (ITG)**

¹ An association of rural telephone companies consisting of Ballard Rural Telephone Cooperative Corporation, Inc.; Brandenburg Telephone Company; Coalfields Telephone Company; Duo County Telephone Cooperative Corporation, Inc.; Foothills Rural Telephone Cooperative Corporation, Inc.; Highland Telephone Cooperative, Inc.; Logan Telephone Cooperative, Inc.; Mountain Rural Telephone Cooperative Corporation, Inc.; North Central Cooperative Corporation; Peoples Rural Telephone Cooperative Corporation, Inc.; South Central Rural Telephone Cooperative Corporation, Inc.; Thacker-Grigsby Telephone Company, Incorporated and West Kentucky Rural Telephone Cooperative Corporation, Inc.

A. PROCEDURAL HISTORY.

On April 23, 2003, NPCR, Inc. d/b/a NEXTEL PARTNERS (“Nextel”), filed a Petition with this Commission seeking Eligible Telecommunications Carrier (“ETC”) status in six rural telephone company study areas and in some non-rural Incumbent Local Exchange Carrier (“ILEC”) wire centers. The rural telephone company study areas for which ETC status was sought were listed in an attachment to the Petition as (1) Leslie County Telco, (2) Lewisport Telco, (3) Logan Telco (Logan Telephone Cooperative, Inc.), (4) Mountain Rural Telco (Mountain Rural Telephone Cooperative Corporation, Inc.), (5) Peoples Rural (Peoples Rural Telephone Cooperative Corporation, Inc.), and (6) South Central Rural (South Central Rural Telephone Cooperative, Inc.).

On June 6, 2003, the Commission entered an Order requesting comments on the application within 30 days and requiring requests for a public hearing on the application to be filed within 60 days of the Order. Thereafter comments were filed by Leslie County Telephone Company and Lewisport Telephone Company (TDS Telecom Properties) and the other four rural ILECs and their association, the Independent Telephone Group. The comments suggested that an in-depth analysis should be conducted to determine whether or not the applicant met the requirements for ETC designation as listed in 47 USC § 214(e)(1) and (2).

A hearing was held on May 25, 2004, and it is now abundantly clear that the verified application, data responses and testimony do not meet the requirements for ETC designation.

B. REQUIREMENTS.

On February 8, 1996, the President of the United States signed Public Law 104-104, the Telecommunications Act of 1996. Section 102 of that Act, now 47 USC § 214(e), is in relevant part:

“(1) Eligible telecommunications carriers

A common carrier designated as an eligible telecommunications carrier . . . shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received—

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier’s services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) Designation of eligible telecommunication carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.”

Pursuant to the authority designated to it the Federal Communications Commission has defined the services or functionalities that are supported by federal universal service support mechanisms and that must be provided by every applicant for ETC status in 47 CFR § 54.101(a):

- (1) Voice grade access to the public switched network,
- (2) Local usage,
- (3) Dual tone multi-frequency signaling or its functional equivalent,
- (4) Single-party service or its functional equivalent,
- (5) Access to emergency services,
- (6) Access to operator services,
- (7) Access to interexchange service,
- (8) Access to directory assistance, and
- (9) Toll limitation for qualifying low-income consumers.

The Federal Communications Commission has also determined that all ETCs shall make available Lifeline service and publicize the availability of Lifeline service. 47 CFR § 54.405 is:

“All eligible telecommunications carriers shall:

- (a) Make available Lifeline service as defined in § 54.401, to qualifying low-income consumers, and
- (b) Publicize the availability of Lifeline service in a manner reasonably designed to reach those likely to qualify for the service.”

Section 54.401 defines Lifeline service as an offering that is available only to qualifying low-income consumers, for which they pay a reduced charge as a result of the application of the Lifeline support amount and that includes all of the functionalities that define federal universal service.

C. SERVICE.

The statutory requirement for ETC status is that the required services must be offered throughout the service area.

One has to look no further than the caption of the verified Petition of the applicant to conclude that all of the applicant's representations are at best, self-serving, unsupported puffery and at the worst, disingenuous.

KRS 365.015(2)(a) provides that no corporation shall conduct or transact business in the Commonwealth of Kentucky under an assumed name unless a certificate of assumed name has been filed with the Secretary of State. The applicant to this Commission is described in the caption of the Petition as "NPCR, INC., d/b/a NEXTEL PARTNERS." An electronic search of the records of the Secretary of State of the Commonwealth of Kentucky indicates that NPCR, INC. has, indeed, qualified to do business in the Commonwealth of Kentucky but, as can be seen on Exhibit A attached hereto, it has no assumed names. The statute is clear—no corporation shall conduct or transact business under an assumed name without filing the Certificate of Assumed Name. NPCR, INC. should not be doing business in the Commonwealth of Kentucky and its Petition should be rejected by the Commission for this reason alone.

Next, the introductory paragraph of the verified application makes an absolutely incorrect statement. "Nextel Partners is licensed to, and provides, wireless telecommunications services throughout certain portions (the "Designated Areas") of Kentucky." The Designated Areas are defined in Attachment 1 to the Petition and are the six rural telephone company study areas and some non-rural ILEC wire centers. Since the applicant is a wireless common carrier, wireless signal coverage or propagation is its chosen method of determining geographical coverage. EVERY signal propagation map used by the applicant demonstrates significant and large gaps in

coverage in each of the six rural telephone company study areas. Recognizing its grossly deficient service capabilities in the Leslie County Telephone Company area, and only in response to a data request, on February 13, 2004, the applicant withdrew its request for ETC designation in the Leslie County Telephone Company rural area. Even after this withdrawal, the allegation in the Petition that the applicant provides services throughout the remaining rural telephone service areas is simply not true.

Nevertheless, the applicant insisted in the remainder of its verified application that it provides service throughout the remaining rural telephone company study areas:

1. “Nextel Partners has sufficient wireless network infrastructure facilities and capacity to provide supported services throughout the Designated Areas in Kentucky over its own facilities.”²

2. “As noted above, these Designated Areas consist of study areas of rural and non-rural telephone companies that Nextel Partners serves in their entirety and wire centers of non-rural ILECs.”³

3. “In Attachment 2 hereto, Nextel Partners provides a map of its service area, within which Nextel Partners provides service to the entirety of the Designated Areas.”⁴

Nextel’s witness, Scott Peabody, admitted the untruthfulness of these verified statements at the hearing.

“We do not provide services throughout all of the designated areas. . . . We did revise the Petition to remove Leslie County, specifically, but, at the time of designation, we do not provide services throughout these areas.”⁵

More serious is the declaration of the vice president of the applicant, attached to the application, where he declares “under penalty of perjury” that the applicant “offers, or will offer,

² Paragraph I.A., p. 2, of the application.

³ Paragraph II, p. 5, of the application.

⁴ Paragraph II, p. 5, of the application.

⁵ Transcript of Evidence, lines 11-12 and 17-20, p. 15.

the supported services using its own facilities;”⁶ Again, Scott Peabody testified at the hearing that this declaration was simply not correct.

“Q. Well, the service that you provide throughout the designated areas, to the extent that you do provide service, is not exclusively through your own facilities; is it?

A. The radio access is exclusively ours, but the way that we connect the cell site back to the switch is generally using leased facilities.”⁷

It is clear from looking at the totality of the information provided by the applicant that their focus is the provision of wireless service in the metropolitan areas of Kentucky (Ashland, Lexington, Louisville, Owensboro, Bowling Green and Elizabethtown) and along the major highways (I-64, I-65, I-75, Edward T. Breathitt Parkway, U.S. 27, and a small portion of U.S. 68). This geographical concentration of service for a wireless carrier is consistent with economic principles. The focus of the wireless carrier must be mobility. To be successful a wireless carrier must provide coverage on main traveled thoroughfares and certainly in metropolitan areas. It is a mere accident, a happenstance, that any coverage is provided by the applicant in rural study areas. The only reason that there is any coverage in the Mountain Rural Telephone Cooperative Corporation area is that I-64 is to the north of the area. The only reason there is any coverage in Peoples Rural Telephone Cooperative Corporation’s area is that I-75 is to the west of the area. The only reason there is any coverage in South Central Rural’s area is that I-65 goes through a portion of the area and the applicant has provided service in the metropolitan area of Glasgow. The only reason there is any service in the Logan County area is that the applicant has provided service in Bowling Green, to the east of the area, and along U.S. 68 which goes through a part of Logan County’s area to Russellville. The concentration of

⁶ Declaration of Donald Manning, paragraph 6.

⁷ Transcript of Hearing, pp. 17 and 18.

the provision of service by the applicant is the very best indicator of its economic focus. It borders on the absurd to suggest that the applicant is going to make an economic commitment to provide universal service throughout the entirety of the four rural telephone service areas.

Mr. Peabody testified that half the distance between cell towers on the interstate, or approximately four miles, would provide good wireless signal propagation. He also agreed, as described in footnote 7 on page 5 of the application, that wireless signal propagation is affected by geography, atmospheric conditions, manmade radiofrequency, and physical structures. If signal propagation from a particular cell site is limited by distance as described by Mr. Peabody, limited by geography, and limited by physical structures, it is very difficult to believe that there is any reasonable wireless service provided by the applicant in Peoples Rural's service area and Mountain Rural's service area. A visual examination of pages 2 and 3 of the confidential documents attached to the applicant's Petition for Confidential Treatment dated June 10, 2004, will confirm the presumed lack of service in those two areas. The other two areas have service only because service is provided along U.S. 68 in the southern portion of Logan County's area and in Glasgow and along I-65 in South Central Rural's area. This selective coverage is consistent with the profit motive enjoyed by the applicant and inconsistent with the provision of service in the rural study areas.

D. ADVERTISING.

ETC status also requires the advertising of the availability of the required services using media of general distribution.

The effort of Nextel to comply with the requirement that it advertise the availability of those services included in universal service support is attached to Scott Peabody's testimony as Exhibit 5. A careful reading of the advertising plan shows that it says the following:

1. Nextel will advertise throughout each ETC service area in a manner that fully informs the general public, and

2. The Nextel Brand name will be advertised nationally using media of general distribution.

This “Plan” would not receive a passing grade in the most basic business class. There has been absolutely no effort made by the applicant to identify advertising media that is local to any of the rural service areas. No information has been supplied that suggests the coverage in the rural service areas by the media selected for advertisement. Designating the two advertising areas in Kentucky by the names of the metropolitan areas therein highlights the focus and intention of the applicant. If the applicant were serious about providing service in the rural study areas, a definitive monetary commitment would be made for each rural service area based upon sound economic principles. In the absence of such a study and effort, one is left with the inevitable conclusion that the applicant wants to share in universal service funding without any commitment to provide service in the rural study areas other than that which happens to flow naturally from its highway and metropolitan focus.

E. LIFELINE SERVICE.

ETCs must make available Lifeline service to qualifying low-income consumers and must publicize the availability of that service in a manner reasonably designed to reach those likely to qualify for the service.

It stretches creditability beyond the breaking point to argue that the applicant’s lowest priced plan, \$35.99 per month for 200 minutes of time, prior to an \$8.00 to \$13.50 discount⁸ would be attractive to any Lifeline customer or remotely competitive with wire line offers available. It further stretches creditability beyond the breaking point to assert that advertising the

⁸ Transcript of Hearing, pp. 67-68.

availability of Lifeline service in the *Keeneland Magazine*, *The Lane Report*, *Business First*, *Evansville Business*, the *Bowling Green News*, the *Louisville Courier Journal*, the *Owensboro, Kentucky Messenger* and the *Lexington Herald-Leader* is “reasonably designed to reach those likely to qualify for [Lifeline] service.”⁹

There are reasons to believe that the applicant is not, and will not be committed to making Lifeline service available and advertise the availability as required by the Federal Communications Commission. For example, there are undoubtedly many potential Lifeline customers in the areas currently served by the applicant in Kentucky but there has been no expression of concern for them nor offer of Lifeline service to them. Applicant has freely admitted, with no apology, that it does not provide Lifeline service anywhere in the Commonwealth of Kentucky today.

“Q. Mr. Peabody, does Nextel provide Lifeline service anywhere in the Commonwealth of Kentucky today?

A. No, sir.”¹⁰

Applicant does enjoy ETC status in some other states, presumably where it does indeed provide service coverage. It does not have a single Lifeline customer in any of those states.

“Q. Can you give us, back to the Lifeline issue, briefly, can you give us a sense of how many Lifeline customers you have in areas where you have already been designated as an ETC?

A. I’m not aware of any Lifeline customers in those areas.
...”¹¹

⁹ 47 CFR § 54.405(b).

¹⁰ Transcript of Hearing, p. 59.

¹¹ Transcript of Hearing, p. 87.

Mr. Peabody admitted that “there are a number of costs that might be preventing”¹² customers from subscribing to Lifeline service. He specifically mentioned one, purchase of a telephone which would be required for \$25.00. In the absence of a definitive proposal from the applicant for Lifeline service in the requested areas in Kentucky, one must conclude that nothing more than lip-service is being offered to comply with the Federal Communications Commission requirement.

E. WESTERN WIRELESS CORPORATION DECLARATORY RULING.

In an effort to excuse the existing lack of service in the rural telephone service areas, the applicant suggests that with the economic assistance derived from ETC status it will provide more service in the rural areas. That vague assertion ignores the reality of economics and the terrain in at least two of the rural service areas. As Scott Peabody said: “We’re going to be challenged with economics. Further, what we found is that island sites, one site in an area, does not really meet customer expectations, so we are averse to building out spot coverages, if you will.”¹³ The vague promise that service will be provided in the smaller markets, where the representative of the applicant does not know when,¹⁴ does not rise to the stature of being a commitment. The applicant relies upon the declaratory ruling of the Federal Communications Commission in the matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation, Petition for Preemption of an Order of the South Dakota Public Utilities Commission, CC Docket No. 96-45. In that decision the FCC determined that, “A new entrant can make a reasonable demonstration to the state commission of its capability and commitment to provide universal service without the actual provision of the proposed service.” However, the FCC put some significant limitations on the reasonable demonstration required for ETC status.

¹² Transcript of Hearing, p. 88.

¹³ Transcript of Hearing, p. 17.

¹⁴ Transcript of Hearing, p. 27.

“We caution that a demonstration of the capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation.”

Any reasonable demonstration of the ability and willingness to provide service throughout the entirety of the rural company service areas would include the following: (1) a cost of service study for each rural service area concluding that the provision of service met the economic goals of the for-profit provider, (2) a detailed capital plan and commitment over time, and (3) an irrevocable commitment, with appropriate sanctions for failure, to provide the required services in the designated areas within a definitive time frame.

The same kind of vague assertions made before this Commission failed to convince the Nebraska Public Service Commission that granting NPCR, INC. ETC status in some rural areas in the Nebraska was consistent with the public interest as that requirement is set forth in the statute. On February 10, 2004, the Nebraska Commission concluded:

“Unlike the case in Western Wireless, the evidence presented in this case, does not convince the Commission that the Applicant is likewise capable of meeting the requirements of Section 214(e). Nor does the evidence indicate to the Commission that the Applicant is willing to meet the basic requirements of Section 214(e).

The Commission further finds that the Applicant has not presented a clear plan and timetable for providing the supported services throughout the designated territory. Upon questioning, the Applicant stated that it would be difficult to follow any parameters set by the Commission in relation to the provisioning of service. (Citation to transcript omitted.) Applicant claims the Commission does not have the ability to set any reasonable parameters to ensure that the requirements of Section 214(e) are fulfilled. This testimony creates concerns in relation to NPCR’s willingness to serve the entirety of the study areas for which NPCR has requested designation.”

The Nebraska Commission also characterized the federal subsidies which would flow with ETC designation as a “windfall” to NPCR, INC. Seeking what it calls competitive neutrality, the applicant has argued here, as it did in Nebraska, that the subsidies to be received upon ETC designation will allow it to expand into the rural service areas. This “stick and carrot” approach was resoundingly rejected in Nebraska.

“Federal subsidies flowing to NPCR may result in just the opposite, a windfall to Applicant, particularly when this Applicant is unwilling to submit to some basic state-imposed requirements such as equal access, the filing of tariffs and service quality benchmarks.”

The Minnesota Public Utilities Commission considered the same request from applicant and concluded that it failed to demonstrate that it was willing and able to serve throughout the designated service areas, that it had failed to meet the advertising requirement because it did not submit an advertising plan adequate to demonstrate its intent and ability to advertise the availability of the nine supported services throughout the proposed service area and that given those failures, the commission was not required to determine whether or not the applicant had met the “public interest requirements.” The applicant in Minnesota petitioned for a reconsideration of the commission’s order which was denied on February 19, 2004.

On March 23, 2004, an administrative law judge for the Texas Public Utility Commission issued a proposal for decision which concluded that, in eight rural areas where it had limited or no coverage, NPCR did not reasonably demonstrate its capability and commitment to offer service upon designation and was unable to identify its build out capacity, any build-out plan, the length of time it would take to build out its network, or any other reasonable demonstration of its capability and commitment to provide service throughout the areas, instead offering only “a vague assertion of intent to provide service.”

Copies of the Nebraska, Minnesota and Texas decisions are attached hereto.

CONCLUSION

In conclusion, these intervenors believe that the application should be dismissed because the applicant has not properly filed an assumed name certificate in the Commonwealth of Kentucky and is therefore ineligible to do business in the Commonwealth of Kentucky; alternatively, that the requested designation should be denied because the applicant has failed to demonstrate that it does or will provide the required functionalities in the rural service areas, has failed to provide sufficient information to conclude that the applicant will advertise the availability of the functionalities in the rural service areas, has failed to offer a realistic Lifeline service, has failed to present an advertising plan for the availability of Lifeline service and because of the unquestioned misstatement of facts contained in the verified application, the applicant's vague and ephemeral assertions are not convincing, and the public interest is not served by granting their request.

Respectfully submitted,

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BY: 
Lindsey Ingram, Jr.

ATTORNEYS FOR INTERVENORS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief has been served by mailing same, postage prepaid, on this 16th day of July, 2004, to the following:

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By 
Lindsey Ingram, Jr.

Organization Number 0475015
Name NPCR, INC.
Profit or Non-Profit P - Profit
Company Type FCO - Foreign Corporation
Status A - Active
Standing G - Good
State DE
File Date 6/1/1999
Authority Date 6/1/1999
Last Annual Report 3/25/2004
Principal Office 4500 CARILLON POINT
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Current Officers

President John Chapple
Secretary Donald J Manning
Treasurer Barry Rowan
Director Timothy M Donahue

This organization has no assumed names

EXHIBIT A

NEBRASKA DECISION

ATTACHMENT

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. C-2932
of Amended NPCR, Inc., d/b/a)
Nextel Partners, Eden Prairie,)
Minnesota seeking designation as) DENIED
an eligible telecommunications)
carrier that may receive)
universal service support.)
) Entered: February 10, 2004

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BY THE COMMISSION:

B A C K G R O U N D

By application filed April 24, 2003, NPCR, d/b/a Nextel Partners (NPCR or Applicant) of Eden Prairie, Minnesota, seeks a designation as an eligible telecommunications carrier (hereinafter, ETC) so that it may receive federal universal service fund support. The application was amended by NPCR on April 28, 2003. Notice of the application was published in The Daily Record, Omaha, Nebraska, on April 30, 2003. No protests or interventions were filed. A hearing on the application was held on July 17, 2003, in the Commission Hearing Room, with appearances as shown above.

The application provides that NPCR seeks designation in several of Qwest's wire centers and in the rural study areas of

Arlington Telephone Company, Blair Telephone Company, Clarks Telephone Company, Diller Telephone Company, Eastern Nebraska Telephone Company, Hamilton Telephone Company, Hartington Telephone Company, Henderson Cooperative, Hooper Telephone, Soddtown Telephone Company, Southeast Nebraska Telephone Company and Stanton Telecom, Inc. (See Attachment 1 to Exhibit 3, hereinafter "Attachment 1".)

In support of the application, NPCR presented one witness, Mr. Scott Peabody, director of engineering for NPCR. In addition to the application and amended application, which were offered and received into evidence as Exhibits 3 and 3(a), NPCR offered the pre-filed testimony of Mr. Peabody into the record. In summary of his written testimony, Mr. Peabody stated that NPCR meets all of the requisite criteria for a grant of ETC status.

NPCR is a Delaware corporation with a principal place of business located in Eden Prairie, Minnesota. NPCR was formed in 1998 to build out and operate a digital mobile network in mid-size, small and rural markets using the Nextel Communications brand name. NPCR launched service in Nebraska in 2000. NPCR has obtained licenses from the Federal Communications Commission (FCC) to operate in territories where 53 million people live and work. NPCR built a self-site network covering over 36 million people in 31 states. Nextel Communications and NPCR are separate companies, though they are working together through strategic agreements. The partnership arrangement has allowed NPCR to offer the same services to rural consumers as those offered to urban consumers by Nextel Communications at the same or similar rates.

The application and pre-filed testimony state generally that NPCR is a common carrier and provides the supported services including voice-grade access to the public switched network, local usage, dual tone, a functional equivalent to dual-tone, multi-frequency signaling, single-party service, access to emergency services, access to operator services, access to interexchange service, access to directory service, and will, upon designation, provide toll limitation for low-income consumers. NPCR's application also states that NPCR will offer and advertise the availability of supported services within the designated areas.

Mr. Peabody further testified that with an ETC designation, NPCR will be eligible to compete on a level playing field with its competitors. According to Mr. Peabody, in rural areas, public interest is served by bringing consumer choice, innovative services and new technologies to the designated

areas. Specifically, the application avers that the public interest test is or will be met because: 1) NPCR's request covers enough territory to prevent cherry-picking, 2) that NPCR will be able to provide universal service on a more competitively neutral basis, 3) that NPCR will provide supported services to Nebraska consumers with service offerings that will be different from landline offerings, 4) that deployment and wireless network expansion will continue with universal service support, 5) that incumbent local exchange carriers (LECs) will be given the incentive to improve their existing networks in order to remain competitive, 6) that NPCR will provide all of the supported services required by the Commission and will allow NPCR to compete on a level playing field, and 7) to promote the extensive role NPCR plays in the provision of communications services to Nebraska public schools, libraries and local, state and federal government agencies.

O P I N I O N A N D F I N D I N G S

In reviewing an application for eligible telecommunications carrier designation, the Commission looks to Sections 254(b) and 214(e) of the Telecommunications Act of 1996 (the Act), in conjunction with applicable FCC rules and regulations.

Section 254(b) of the Act defines universal service by outlining six principles:

1. Quality services should be available at just, reasonable and affordable rates.
2. Access to advanced services should be provided in all regions of the nation.
3. Consumers in all regions of the nation should have access to services (including advanced services) at rates that are reasonably comparable to those in urban areas.
4. All telecommunications providers should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.
5. There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.
6. Schools and libraries should have access to advanced services.

In 1997, the FCC released its Universal Service Report and Order in CC Docket 96-45, FCC 97-157 (Universal Service Order), which implemented several sections of the Act. The FCC's Universal Service Order provides that only eligible

telecommunications carriers designated by a state commission shall receive federal universal service support. Section 214(e) of the Act delegates to the states the ability to designate a common carrier as an ETC for a service area designated by the state commission. A service area is the geographic area established for the purpose of determining the universal service obligation and support eligibility of the carrier. The FCC also provided that "competitive neutrality" should be an added universal service principle.

Section 214(e)(1) provides that an ETC Applicant shall:

Throughout the service area for which such designation is received--

- (A) offer the services that are supported by federal universal service support mechanisms under section 254 . . .; and
- (B) advertise the availability of such services and the charges therefore using media of general distribution.

The FCC's supported services are found in 47 C.F.R. § 54.101(a) and are as follows:

- a. voice grade access to the public switched network;
- b. local usage;
- c. dual tone multi-frequency signaling or its functional equivalent;
- d. single-party service or its functional equivalent;
- e. access to emergency services;
- f. access to operator services;
- g. access to interexchange services;
- h. access to directory assistance; and
- i. toll limitation for qualifying low-income consumers.

Upon review of the application and testimony presented, the Commission finds that Applicant offered only generalized statements that it has the ability to provide the supported services listed in a-i, above.

Federal law further provides that:

In the area served by a rural telephone company "service area" means such company's "study area" unless and until the Commission and the States after taking into account recommendations of a

Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

Section 214(e)(2) generally provides,

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. **Upon request and consistent with the public interest, convenience, and necessity**, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate **more than one** common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). (Emphasis Added).

In an area served by rural carriers Section 214(e)(2) further requires ETC Applicants to demonstrate to the state Commission that the designation of **an additional** ETC is in the public interest. (Emphasis Added).

The Commission previously found in its Western Wireless Order that it was not necessary for an ETC to be offering the supported services and advertising the availability and charges of the services prior to ETC designation. However, in that ruling the Commission also found that Western Wireless had presented sufficient and credible evidence that it was willing and capable of meeting the requirements of Section 214(e)(2) and had every intention of carrying out its plan to provide the supported telecommunications services *throughout the designated area*. Western Wireless provided detailed evidence as to how its basic universal service offering (BUS) was to be provided over a wireless access unit and antenna combination that was capable of reaching even the most insular rural areas of the state.

Unlike the case in Western Wireless, the evidence presented in this case, does not convince the Commission that the Applicant is likewise capable of meeting the requirements of Section 214(e). Nor does the evidence indicate to the Commission that the Applicant is willing to meet the basic requirements of Section 214 (e).

The Commission further finds that the Applicant has not presented a clear plan and timetable for providing the supported services throughout the designated territory. Upon questioning, the Applicant stated that it would be difficult to follow any parameters set by the Commission in relation to the provisioning of service. (Transcript at 53:8-20). Applicant claims the Commission does not have the ability to set any reasonable parameters to ensure that the requirements of Section 214(e) are fulfilled. This testimony creates concerns in relation to NPCR's willingness to serve the entirety of the study areas for which NPCR has requested designation.

In sum, the Commission finds that NPCR has not provided sufficient evidence that it is willing and capable of meeting the core eligibility requirements of section 214(e). NPCR failed to provide sufficient evidence that it can provide the supported services listed in 47 C.F.R. § 54.101 et seq. and failed to demonstrate to the Commission that it is willing to serve the entire designated area.

We also interpret the language in Section 214(e)(2) to mean that the Commission is only obligated to designate more than one ETC in a given territory served by non-rural carriers. Specifically, Section 214 (e)(2) reads that upon a finding that it is consistent with public interest and necessity, the Commission **shall** designate **more than one** ETC in an area served by a non-rural company. The plain construction of the phrase "**more than one**" in the Commission's opinion means the designation of a second ETC is required upon a finding that said ETC Applicant has satisfied the requirements of the Act and FCC regulations. However, the Commission finds that the literal reading of Section 214(e)(2) stops there. The Commission believes that the designation of a third or fourth ETC in a given territory served by a non-rural carrier is purely discretionary. In light of this interpretation, the Commission finds that it has already satisfied the requirement in Section 214(e)(2) by designating more than one ETC in all of the proposed non-rural territory described by NPCR in Attachment 1 to its application.

In addition, with respect to the request to be designated as an additional ETC in the rural areas outlined in Attachment 1, the Commission finds that the Applicant has not sufficiently proven that designation is in the public interest.

To demonstrate public interest, the Applicant's witness testified that the addition of it as a competitor and the introduction of new technologies in the rural market satisfy the public interest test. To further support its argument that a

designation is in the public interest, the Applicant states that the Commission should review its application against this Commission's Western Wireless Order. If we would do so, NPCR's application would fall short of the standards set by the Commission. First, as stated above, we do not believe Applicant has shown that it is willing to provide the supported services throughout the designated territory. We do not believe that Applicant's proposed service territory is large enough to properly address our concerns relating to "cherry picking." Moreover, there is no indication that a designation in the present case would lead to "increased" competition. Finally, while the Commission did provide an analysis of public interest in the Western Wireless case, the Commission believes that a public interest analysis requires a case-specific finding. A review of public interest requires the Commission to carefully balance the public benefits and public harms of approving an ETC application. This requires the Commission to look at the environment at the time designation is sought. In the present case, Applicant is already providing the wireless service throughout its licensed territory in Nebraska. Applicant offered no evidence that it will, in fact, extend its service or provide better service than presently being offered. Instead, Applicant has made generalized statements with respect to public interest, which even if true, would not distinguish itself from any other wireline or wireless provider.

Nonetheless, we will address NPCR's claims individually. First, NPCR claims that its proposed territory is large enough to prevent cherry-picking. We do not believe that it is. NPCR does not give any other information to back this claim with the exception of a map, which outlines its licensed territory and signal strength. (See Exhibit 8). Exhibit 8 demonstrates that large regions of territory served by Eastern Nebraska Telephone and Stanton will go unserved while the higher populated areas will continue to receive NPCR's service. In response to Commission questions, Applicant could not give the Commission a time frame in which to expect all proposed designated areas to be served. Further, unlike Western Wireless, NPCR's application covers only a part of the eastern portion of the state, leaving the western half of the state unserved. We do not think the proposed territory is large enough to prevent cherry-picking.

Next, NPCR states that with federal support, it will be able to provide universal service on a more competitively neutral basis. Competitive neutrality was added by the FCC to the Section 254 list of universal service principles. Contrary to the position of NPCR, we find that the goal of competitive neutrality is not automatically met with the designation of an additional ETC in the areas served by rural companies. As NPCR

is already successfully providing a wireless service in that area, there is no reason to believe that NPCR needs a subsidy to level the competitive playing field. Federal subsidies flowing to NPCR may result in just the opposite, a windfall to Applicant, particularly when this Applicant is unwilling to submit to some basic state-imposed requirements such as equal access, the filing of tariffs and service quality benchmarks.

Third, NPCR states that it will provide supported services to Nebraska consumers with service offerings that will be different from landline offerings. NPCR is providing service in the proposed territory now. There was no evidence produced which would indicate that this ETC designation would produce better or more valuable services than those currently available to rural consumers. Although NPCR claims that it will expand deployment of its wireless network as it receives universal service support, it brought forth no specific evidence of where and when it plans to do so. In fact, the NPCR witness stated in the hearing that NPCR could not give any timetable for any such expansion.

Further, NPCR claims that incumbent local exchange carriers (ILECs) will be given the incentive to improve their existing networks in order to remain competitive. We do not believe this to be true. Because NPCR does not directly compete with the service of the rural incumbent carrier, there would be no incentive for the incumbent LECs to make any improvements. Moreover, we note that current state universal service mechanisms already give incumbent LECs incentives to improve their existing networks.

Finally, NPCR states that public interest is met because designation will promote the extensive role NPCR plays in the provision of communications services to Nebraska public schools, libraries and local, state and federal government agencies. NPCR offered no specific evidence of how this would come about or where universal service support would be invested.

In today's marketplace, we find that the question to be answered is whether subsidizing NPCR's service offering in the proposed Nebraska rural territories is good public policy. Looking back to its 2000 Western Wireless decision, the Commission finds that perhaps its public interest analysis wasn't rigorous enough and tailored enough to the goals of universal service. To be sure, the Commission was more concerned at that time with bringing competition to the rural areas of Nebraska. Since then, the environment and the Commission's focus has changed. The Commission believes that universal service is not a vehicle by which competition should

be artificially created. The purpose of universal service is not to promote competition. Rather, the purpose of universal service is found in section 254 of the Act. To this end, the Commission's role is to ensure that the universal service principles continue to be served in a competitive environment.

As we noted in our Western Wireless Order,

The mere provision of additional competition by the entry of another ETC into a rural area is not sufficient in and of itself as a demonstration of the public interest. We accept the argument made by the Intervenor that, "Competition is not tantamount to public interest." If that were the case, no public interest test review would be necessary since any and all new competitors would represent additional benefit to the public.

In light of the current environment, we find that the real issue to consider is whether Applicant's competitive efforts in the proposed territory should be subsidized by payments from the federal USF. We find they should not. As the Applicant's case demonstrates, no federal subsidy is necessary to bring Applicant's service to the rural areas. Applicant is already serving the rural areas and bringing new technologies to these areas without the assistance of a federal subsidy. We further believe an ETC designation would not place Applicant on a level playing field with the incumbent carriers. Rather, a grant of the application would grant to the Applicant distinct advantages over the incumbent carriers, jeopardizing their ability to serve all of their subscribers adequately and jeopardizing the principles set forth in section 254. In addition, Applicant is virtually unregulated in terms of service quality, and Applicant has no equal access obligations that the incumbent carriers have. Unlike Western Wireless, Applicant was unwilling to submit its service to some service quality benchmarks, file tariffs, or consent to the Commission's general jurisdiction over consumer complaints. Consumers in the proposed territory are already receiving telecommunications services from the Applicant without additional costs. If this application is granted, consumers would be required to bear the additional costs necessary to subsidize the service provided by the Applicant. Accordingly, we find that the public costs in granting an ETC designation in the territory served by the rural carriers outweighs any supposed benefits offered by Applicant.

In sum, we find NPCR's application for ETC designation in the proposed territories described in Attachment 1 to the

application served by non-rural carriers and by rural carriers should be denied.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the application of NPCR d/b/a Nextel Partners should be and it is denied.

MADE AND ENTERED at Lincoln, Nebraska, this 10th day of February, 2004.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

Commissioners Anne Boyle and Lowell Johnson dissenting:

We respectfully dissent. NPCR, d/b/a Nextel Partners (NPCR) filed this application seeking eligible telecommunications carrier (ETC) designation in areas served by Qwest and a number of rural independent companies. The Commission duly published notice of the application and placed all carriers on notice of NPCR's intentions. Even though there has been great controversy at the state and national level regarding designation of ETC status, no party opposed or intervened. It is well established that the "failure to timely file a protest shall be construed as a waiver of opposition and participation in the proceeding." See Neb. Admin. Code Title 291, Chapter 1, Section 014.01.

Nevertheless, in order to ensure that NPCR's offering satisfied all criteria outlined in the federal Telecommunications Act of 1996 (the Act), the Nebraska Public Service Commission (NPSC) chose to hold a hearing. NPCR, through its witness, offered into the record evidence on each element of proof necessary. The Commission accepted the evidence and did not dispute NPCR's claim that they had met all criteria required by the Act.

We are very concerned about the Federal Universal Service Fund (USF) from which ETCs draw funding. As the FCC has recognized, designation of additional ETCs draws more from the USF, which is suffering from ever-increasing demands and diminishing sources of revenue. Some rural associations have criticized states for cursorily granting ETC designation. However, we do not believe that the states should be to blame as the term "public interest" has been an ill-defined and ever changing test. At the time of the hearing on this application, the FCC hadn't offered clear guidelines to states to determine public interest. It was only recently, that the FCC, by Memorandum Opinion and Order involving Virginia Cellular, Inc., gave states a specific framework for making their public interest judgments.¹ However, the FCC explained that its public interest analysis may again be altered due to the Joint Board's deliberations and any other public interest framework that the FCC may adopt.

In reviewing this application, we question whether designation of ETC status in rural areas where competition may harm existing carriers of last resort. At the same time we consider whether customers are well served without the benefit of choice. A competitive ETC does not draw until it begins to provide service. Therefore, the only tests states can consider

are the objective criteria set by the Act and the public interest.

We are hopeful that the FCC will give states more authority to look to a number of relevant factors prior to designation. If states are to consider the size of the fund, the FCC should compute a formula to determine the amount each state should receive. A federal/state partnership would allow each state to administer their portion of the fund. Currently carriers simply certify they are properly using provided funds. State administration would allow closer scrutiny to ensure proper use of funds. Currently, states have no control over the size or disbursements from the federal USF.

Based on the record in this case, it is our opinion that the NPSC is legally unable to make a decision to deny an ETC application simply because of the aforementioned concerns. With no protests, no dispute that necessary criteria had not been met and no provision in the Act for state discretion to deny an application other than those previously mentioned, the application should be granted.

Anne C. Boyle

Lowell C. Johnson

MINNESOTA DECISION

ATTACHMENT

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
Marshall Johnson
Ken Nickolai
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of NPCR, Inc. d/b/a Nextel
Partners Designation as an Eligible
Telecommunications Carrier under 47 U.S.C.
§214(e)(2)

ISSUE DATE: February 27, 2004

DOCKET NO. PT-6200/M-03-647

ORDER DENYING PETITION FOR
RECONSIDERATION

PROCEDURAL HISTORY

On April 25, 2003 NPCR, Inc. d/b/a Nextel Partners (Nextel) submitted its original filing asking the Commission to designate it as an eligible telecommunications carrier (ETC) for the purpose of receiving support from the federal universal service fund.

On December 1, 2003, the Commission issued its ORDER DENYING WITHOUT PREJUDICE NEXTEL'S APPLICATION FOR ETC DESIGNATION.

On December 19, 2003, Nextel Partners filed its petition for reconsideration of the Commission's Order.

On December 29, 2003, the Minnesota Department of Commerce (the Department) and the Minnesota Independent Coalition (MIC) filed comments opposing Nextel's petition.

The Commission met on February 19, 2004 to consider this matter.

FINDINGS AND CONCLUSIONS

The petition for reconsideration has not demonstrated grounds warranting alteration of the earlier Order. The petition, accordingly, will be denied.

ORDER

1. Nextel's petition for reconsideration of the Commission's December 1, 2003 Order in this matter is denied.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
Marshall Johnson
Ken Nickolai
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of NPCR, Inc. d/b/a Nextel
Partners for Designation as an Eligible
Telecommunications Carrier Under 47 U.S.C.
§214(e)(2)

ISSUE DATE: December 1, 2003

DOCKET NO. PT-6200/M-03-647

ORDER DENYING WITHOUT PREJUDICE
NEXTEL'S APPLICATION FOR ETC
DESIGNATION

PROCEDURAL HISTORY

On April 25, 2003, NPCR, Inc. d/b/a Nextel Partners (Nextel) submitted its original filing asking the Commission to designate it as an eligible telecommunications carrier (ETC) for the purpose of receiving support from the federal universal service fund.

On May 5, 2003, Citizens Telecommunications Company of Minnesota, Inc. (Citizens) and the Minnesota Independent Coalition (MIC) filed challenges to the completeness of Nextel's petition. Nextel responded to the challenges on May 12, 2003.

By May 15, 2003, the Commission had received comments from Citizens and the Minnesota Department of Commerce (the Department). The parties argued that Nextel's filing is inadequate.

On July 17, 2003, the Commission met to act on Nextel's petition. Following discussions with the other parties, Nextel agreed at the Commission meeting to file supplemental information concerning its service offerings, facilities and advertising plan. Nextel also agreed that the 180-day timeline would begin upon its making a supplemental filing. The Commission agreed to defer consideration of Nextel's ETC petition until the record was more fully developed.

On July 28, 2003, Nextel submitted a supplemental filing to the pending petition.

On August 18, 2003, the Department and Citizens filed comments.

On August 20, 2003, the Commission issued its ORDER REQUIRING ADDITIONAL FILINGS AND VARYING TIME PERIOD.

On August 28, 2003, MIC and Nextel filed reply comments.

The Commission met on October 23, 2003 to consider this matter.

FINDINGS AND CONCLUSIONS

I. NEXTEL'S PETITION

Nextel asked the Commission to designate it an eligible telecommunications carrier (ETC) so that it can receive financial support from the federal universal service fund. Nextel stated that the requirements for ETC designation are set forth in 47 U.S.C. § 214(e)(1)-(2), 47 C.F.R. § 54.101, and Minn. Rules, Part 7811.0100, subp. 15. The Company argued that it met all the requirements for designation. Specifically, Nextel asserted that (1) it is a common carrier as required by 47 U.S.C. § 214(e)(1), (2) it provides each of the supported services identified by the Federal Communications Commission (FCC), and (3) it will meet all service and advertising obligations of an ETC.

On May 12, 2003, Nextel replied to Citizens' and MIC's objections that Nextel's petition was incomplete for failure to provide certain information. Nextel maintained that its petition was complete because it provided the items listed in the relevant rule, Minn. Rules, Part 7811.1400, subp. 4. While Nextel acknowledged that in two previous ETC cases the Commission had requested the additional items cited by MIC and Citizens it argued that this did not mean that these items were now filing requirements. Nextel stated that although it was not required to do so, it would voluntarily provide some of the information mentioned by MIC and Citizens: information regarding its service offerings, facilities, and advertising plan.

On July 28, 2003, Nextel supplemented its petition. The Company 1) clarified that Nextel Partners and Nextel Communications jointly market the "Nextel" brand name throughout their national service area; 2) argued that while it does not offer a service comparable to other ETCs' universal service offering, all of its conventional service plans qualify for universal service funding because they contain the nine supported services and are priced to rural customers at the same competitive price charged by Nextel Communications in the metro areas; 3) described its Minnesota facilities and service area; 4) submitted its advertising plan and discussed its commitment to advertise its service offerings throughout its Minnesota service area; 5) provided its standard custom service agreement; and 6) reaffirmed its arguments why designating it an ETC will benefit the public.

II. THE LEGAL STANDARD

Applications for ETC status are governed by federal and state law.¹ Section 214 of the Telecommunications Act of 1996 requires an ETC to offer certain designated services throughout

¹ 47 U.S.C. §§ 254, 214; 47 C.F.R. § 54.101; Minn. Rules parts 7811.1400 and 7812.1400. The fact that this Order analyzes and denies the petition based on provisions of the federal law does not negate the fact that there are also state standards and conditions to bring to bear on a petition for ETC status. For instance, while 47 U.S.C. § 214(e)(2) requires a public interest finding only when an applicant seeks ETC designation in an area served by a rural telephone company, Minn. Rules, Part 7812.1400, subp. 2 requires a public interest determination when a CLEC seeks ETC status in areas served by non-rural as well as rural telephone companies. See *In the Matter of the Petition of WETEC LLC dba Unitel Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. P-5614/M-03-1051, ORDER (November 26, 2003).

its ETC-designated service area, use its own facilities or a combination of its own facilities and resale of another carrier's service in providing these services, and advertise the availability and price of these services.² While the list of designated services may change over time,³ FCC rule § 54.101(a) currently designates the following services:

1. voice grade access to the public switched network
2. local usage
3. touch-tone service or its functional equivalent
4. single-party service
5. access to emergency services, including 911 and enhanced 911
6. access to operator services
7. access to interexchange services
8. access to directory assistance
9. toll limitation for qualifying low-income customers

This Commission has the responsibility for designating ETCs in Minnesota except where it lacks jurisdiction over an applicant.⁴

An applicant for ETC status must make several showings before it is deemed eligible for ETC status under the Act. These requirements are found in 47 U.S.C. § 214(e). First, the applicant must be a common carrier. Second, the applicant must offer the services that are supported by federal universal service support mechanisms under 47 U.S.C. § 254(e). Third, the applicant must do so either using its own facilities or a combination of its own facilities and resale of another carrier's services. Fourth, the applicant must offer the identified services throughout the service area for which the designation is received. Fifth, the applicant must advertise the supported services and charges therefor throughout the service area for which the designation is received using media of general distribution.⁵

Once a state commission determines that an applicant meets these five requirements, the applicant is entitled to receive ETC status unless the applicant is seeking to serve exchanges in which the incumbent local exchange carrier is a rural telephone company. If the applicant is seeking ETC status in an area served by a rural telephone company, the state commission must make an additional finding that the designation is in the public interest.

III. COMMISSION'S ANALYSIS AND ACTION

The Commission is required to confer ETC status on Nextel if it finds that the Company meets the requirements of 47 U.S.C. 214(e)(1)(A) and (B) and, since Nextel seeks designation in areas served by rural telephone companies, the public interest standard of 47 U.S.C. 214(e)(2).

² 47 U.S.C. § 214(e)(1).

³ 47 U.S.C. § 254(c)(1).

⁴ 47 U.S.C. § 214(e)(6).

⁵ These five requirements are established in 47 U.S.C. § 214(e)(1).

Having reviewed the record developed in this matter and heard the parties' oral arguments, the Commission finds that Nextel has failed to meet the service and advertising requirements of 47 U.S.C. § 214(e)(1), as explained more fully below.

A. Requirement to "Offer Services" Throughout the Service Area

An ETC must offer the services that are supported by federal universal support mechanisms under section 254(e)(1) throughout the service area for which the designation is received.⁶ The FCC has advised in a Declaratory Ruling that a carrier requesting ETC status is not required to provide ubiquitous service at the time of its application.⁷ In the same Ruling, however, the FCC clarified that applicants must support their assertions of ability and willingness to provide service throughout the service area with credible evidence:

We caution that a demonstration of the capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation.⁸

In this case, Nextel has not adequately supported the assertion in its verified petition that it will meet all service obligations of an ETC. Nextel has acknowledged that there were large areas of its service area that it cannot serve at present. The Company presented no plan for expanding its service capabilities and simply stated that receipt of the universal service funding would change (in unspecified ways) the economic model that might (no guarantee or analysis to show reasonable likelihood) make expansion (of unspecified extent) into some (unspecified) areas possible. The extent to which the economic model would change was not specified. No guarantee of expansion or analysis was provided to demonstrate the likelihood of expansion. No areas were identified for expansion. At the same time, the Company stated that the cost of installing one additional signal tower was approximately \$250,000 to \$300,000 and that the annual revenue initially anticipated from the universal service fund is approximately \$100,000.

In these circumstances and based on this record, therefore, the Commission finds that Nextel has failed to demonstrate that it is willing and able to serve "throughout the service area for which the designation is received . . ." as required of an ETC by 47 U.S.C. § 214(e)(1).⁹

⁶ 47 U.S.C § 241(e)(1).

⁷ *In the Matter of Federal-State Joint Board on Universal Service Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, CC Docket 96-45, FCC 00-248, 15 FCC Rcd at 15175, Paragraph 17 (August 10, 2000) (Declaratory Ruling).

⁸ Declaratory Ruling, Paragraph 24.

⁹ In its July 31, 1998 Order in Docket No. P-5508/M-98-561, the Commission denied a petition for ETC status by Crystal Communications, a Minnesota competing local exchange company (CLEC), on the basis that the record in the case was insufficient to conclude that the applicant would offer the required services throughout the service area for which the designation

B. Requirement to Advertise the Supported Services Throughout the Service Area

An applicant must also be willing and able to **advertise** the availability of and the charges for the services that are supported by the federal universal service support mechanisms 1) throughout the service area for which ETC designation is sought and 2) using media of general distribution.¹⁰

In its petition filed April 24, 2003, Nextel stated that it would advertise the availability of the supported services and charges therefor using media of general distribution. Nextel stated that after being designated an ETC, it would continue to advertise its services in designated areas and work with the Department to develop an advertising plan consistent with what other ETCs implemented.

The Department objected that Nextel did not include an advertising plan nor had it provided detail regarding its plans specifically to advertise its universal service offering(s) and the availability of Lifeline and Link-Up for qualifying customers, either to advertise the availability of a basic universal service offering or to advertise the availability of the nine supported services throughout its proposed service area.

In its May 12, 2003 reply to MIC's and Citizens' challenge to the completeness of its petition, Nextel stated that it would file supplemental information, including an advertising plan. On July 28, 2003, it filed supplemental information, including a document entitled Advertising Plan of NPCR, Inc.

On August 18, 2003, the Department argued that the advertising information provided by Nextel was inadequate. The Department stated that Nextel had failed to provide a plan to advertise a basic universal service offering or to advertise the availability of the nine supported services throughout its proposed service area.

The Commission finds that Nextel fails to meet the advertising requirement of 47 U.S.C. § 214(e)(1)(B) because it has not submitted an advertising plan adequate to demonstrate its intent and ability to advertise the availability of the nine supported services throughout its proposed service area. In light of the Company's inability to serve throughout its requested area, as found above, Nextel's assertion that it will advertise throughout the area as required by law is not an adequate substitute for submitting an actual advertising plan whose scope and detail demonstrates the Company's intent and capability to advertise the availability of the nine supported services throughout its proposed service area.

Because the Nextel application fails the "advertise" requirement of 47 U.S.C. § 214(e)(1)(B) for reasons explained in the preceding paragraph, it is unnecessary to reach the further issue whether it

was requested. *In the Matter of Crystal Communications' Petition to Become an Eligible Telecommunications Carrier*, Docket No. P-5508/M-98-561, ORDER GRANTING IN PART, DENYING IN PART, STATUS AS ELIGIBLE TELECOMMUNICATIONS CARRIER (July 31, 1998), at page 5.

¹⁰ 47 U.S.C. § 214(e)(1).

also fails that requirement because it did not include an advertising plan for a basic affordable universal service offering.¹¹

C. Affordability: a Public Interest Consideration

To date, Nextel has refused to offer, let alone advertise, a particular universal service offering as distinguished from any of its other service offerings. Nextel has asserted that requiring an applicant to offer a lower cost “affordable” rate would be impermissible rate regulation. Nextel argued that although offering and advertising such a service (a separate and distinct lower cost universal service offering) was the way that past applicants¹² have chosen to meet the “offer and advertise” requirements of 47 U.S.C. § 214(e), the law does not require that an applicant make such an offering in order to qualify for ETC status. In addition, Nextel asserted that there are no standards on what can be considered affordable and nothing in the record to indicate that Nextel’s offerings were not affordable.

Nextel stated that, even though it offered no particularized lower cost universal service offering, each of its regular, nationally offered and advertised offerings provide all the required functionalities, i. e., the nine supported services listed by the FCC in 47 C.F.R. § 54.101(a). As a consequence, Nextel argued, offering its nationally offered set of services meets the “offer” requirement of 241(e)(1)(A) and advertising those services meets the “advertise” requirement of 241(e)(1)(B).

The Department countered that in the context of ETC designation for receipt of public funds requiring an applicant to offer at least one “affordable” (in the sense of “lower cost”) service that contains some level of local service does not constitute prohibited rate regulation. The Department cited 47 U.S.C. 254(i):

The [Federal Communications] Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

The Department noted that the FCC rules permit a state commission to designate additional qualifying ETCs for areas served by a rural telephone company only if the state commission finds that the designation of more than one carrier is in the public interest. The Department noted that the FCC has not defined the public interest factors that the state Commission may or should consider when designating an additional ETC in a rural service area. According to the Department,

¹¹ Not reaching the affordability issue at this time in the context of the advertising requirement is also appropriate because, as explained next in section C, affordability is a public interest consideration which is reached only if Nextel’s next application for ETC status meets the threshold ETC requirements of 47 U.S.C. 214(e)(1)(A) and (B).

¹² Western Wireless Corporation (fka Minnesota Cellular Corporation) in Docket No. P-5695/M-98-1285; Tekstar Communications, Inc. in Docket No. P-5542/M-01-1865; Midwest Wireless Communications, L.L.C. in Docket No. P-573/AM-02-686; and RCC Minnesota, Inc. and Wireless Alliance, LLC (filing jointly as affiliates of Rural Cellular Corporation) in Docket No. PT-6182, 6181/M-02-1503.

however, there can be no doubt that affordability is a public interest factor. The Department noted that state Commissions have been given the primary role in evaluating the affordability factor. The Department cited the following FCC statement:

We agree with the [Federal-State] Joint Board [on Universal Service] that states should exercise initial responsibility, consistent with the standards set forth above, for determining the affordability of rates. . . . As the Joint Board determined, the unique characteristics of each jurisdiction render the states better suited than the Commission to make determinations regarding rate affordability.¹³ [Bracketed material added.]

Based on the parties' arguments and a review of the statutory and regulatory framework, the Commission finds that affordability is an appropriate public interest factor to consider during any public interest evaluation of an application from Nextel.

The public interest evaluation of an application such as Nextel's, however, is properly conducted **after** the applicant is found to have met the threshold statutory requirements of 47 U.S.C. § 214(e)(1).¹⁴

As noted previously in this Order, Nextel has not met all those requirements. Therefore, the public interest factors applicable to Nextel's application (which include affordability and service quality) are not ripe for consideration at this time. Accordingly, the Commission will make no findings at this time whether, for example, the public interest requires Nextel to provide, as the Department has argued, at least one affordable lower cost alternative service offering that includes some level of local calling.

IV. LOOKING AHEAD

The denial of Nextel's application will be without prejudice. In the event that Nextel refiles with new information that persuades the Commission that it meets the threshold requirements of

¹³ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157, "Report and Order," 12 F.C.C. Rcd 8776 (rel. May 8, 1997) ¶ 108 aff'd in part and reversed in part, *Texas Office of Pub Utility Counsel v. FCC* 183 F.3d 393 (5th Cir. 1999) ¶ 118.

¹⁴ Analysis under 47 U.S.C. § 214(e) of applications for ETC status in an area served by a rural telephone is a two step process. The first step is to determine whether the applicant meets the threshold statutory requirements of 47 U.S.C. § 214(e)(1)(A) and (B). If so, the second step is to determine whether the applicant satisfies the public interest standard of 47 U.S.C. § 214(e)(2). The two-step analysis followed by the Commission in this Order is consistent with the approach used by the Administrative Law Judge (ALJ) and by the Commission in the two most recent ETC applications: *Midwest Wireless Communications*, Docket No. PT-6182, 6181/M-02-1503 and *RCC Minnesota, Inc./Wireless Alliance*, Docket No. PT6153/AM-02-686.

47 U.S.C. § 214(e)(1)¹⁵, the Commission will undertake the public interest evaluation of that application.

An applicant for ETC designation bears the burden of proof on all the federal and state requirements and considerations applicable to its application. Information adequate to meet the filing requirements on Minn. Rules, Part 7811.1400, subp. 4 is not necessarily adequate to meet the applicant's burdens of proof and persuasion on all issues relevant to the application. An applicant, therefore, is advised to build a complete record containing much information beyond the Commission's filing requirements.

In previous proceedings involving applications for ETC designation in areas served by rural telephone companies, the Commission has directed applicants to provide several specific items beyond what was required to meet the initial filing requirements.¹⁶ With no attempt to be comprehensive, the Commission has listed in footnote 14 two informational items relevant to meeting the Phase 1 threshold requirements.¹⁷ The Commission believes that the following information would be relevant to the public interest evaluation:

1. a detailed description of a basic universal service offering or affordable alternative or an explanation of why it would be in the public interest to give an applicant access to universal service funding if that applicant does not offer an affordable lower cost service that specifically preserves and advances universal service;
2. a tariff or price list showing the list, prices and terms of offered services including local usage levels and calling areas for which the applicant seeks universal service support, including the terms and rates for the basic universal service package, along with references to Lifeline and Link-Up and other services which may be added to the basic universal service package;

¹⁵ Information relevant to those determinations would include 1) an advertising plan specific to a basic universal service offering, the nine-supported services, and the availability of Lifeline and Link-Up for qualifying customers and 2) a list of facilities used to provide services in the area in which Nextel seeks certification.

¹⁶ In addition, in its Order designating each of Minnesota's incumbent local exchange companies (ILECs) as ETCs, the Commission required each ETC to submit an advertising plan, including a description of available services and their rates; the geographic area where those services are available; the medium of publication of the advertising, including the names of, and geographic areas served by, the newspapers in the plan, and the size and the type of the advertising. *In the Matter of the Request by Members of MIC for Designation as an Eligible Telecommunications Carrier and Temporary Suspension of Certain Toll Restrictions and In the Matter of the Requests by Other Incumbent LECs for ETC Designations*, Docket No. P-999/M-97-1270, ORDER DESIGNATING PETITIONERS AS ELIGIBLE TELECOMMUNICATIONS CARRIERS (December 23, 1997).

¹⁷ The Phase 1 threshold requirements appear in 47 U.S.C. § 214(e)(1)(A) and (B).

3. a customer service agreement that defines a service quality plan consistent with the Company's claim to provide high quality services, including dispute resolution policies, network maintenance policies, procedure for resolving service interruptions, any customer remedies offered, and Nextel's billing, payment, and deposit policies;
4. a list of and Nextel's commitment to its federal obligations regarding its service area;
5. information typically gathered from ETCs in the annual certifications;
6. description of the process the Company will use to track and make available to the Commission and the Department, upon request, the following: (a) held orders for customer premises equipment and for either the basic universal service plan or any services the Company relies on to meet the "offer" requirement of 47 U.S.C. § 214(e)(1)(A) for more than 30 days and (b) customer complaints or disputes related to service quality, including reports of interrupted service for the basic universal service plan and for any service the Company relies on to meet the "offer" requirement of 47 U.S.C. § 214(e)(1)(A).

This Order will not contain a directive for Nextel to include any particular information with its next application because to do so would be premature. Moreover, the Department, any intervening party, and Commission Staff can submit Information Requests to the Company for any information they deem relevant. As in previous proceedings, however, it is unlikely that the Commission will begin the 180 day processing period prescribed in Minn. Rules, Part 7811.1400, subp. 12 until the information referenced has been filed.¹⁸

ORDER

1. Nextel's application for designation as an eligible telecommunications carrier (ETC) for the purposes of receiving universal service funding is denied without prejudice.

¹⁸ The Commission took this view in the two most recent ETC proceedings. See *In the Matter of the Petition by RCC Minnesota, Inc. and Wireless Alliance, L.L.C. for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. § 214(e)(2)*, Docket No. PT-6182/M-02-1503, ORDER REQUIRING ADDITIONAL FILING, VARYING TIME PERIOD AND NOTICE AND ORDER FOR HEARING (November 4, 2002) at pages 4 and 9; and *In the Matter of the Petition by Midwest Wireless Communications, L.L.C. for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. § 214(e)(2)*, Docket No. P-573/AM-02-686, ORDER REQUIRING ADDITIONAL FILINGS, VARYING TIME PERIOD AND NOTICE AND ORDER FOR HEARING (July 5, 2002) at pages 3-5 and 8.

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice) or 1-800-627-3529 (TTY relay service).

TEXAS DECISION

ATTACHMENT

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

March 23, 2004

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PUBLIC UTILITY COMMISSION
FILED CLERK

TO: Stephen Journeay, Director
Office of Policy Development
William B. Travis State Office Building
1701 N. Congress, 7th Floor
Austin, Texas 78701

RE: SOAH Docket No. 473-03-3673
PUC Docket No. 27709

Application of NPCR, Inc. d/b/a Nextel Partners for Eligible Telecommunications Carrier Designation

Enclosed are two copies of the Proposal for Decision (PFD) in the above-referenced case. Please file-stamp and return a copy to the State Office of Administrative Hearings for our records. Also enclosed is a disk containing an electronic copy of the PFD. By copy of this letter, the parties to this proceeding are being served with the PFD.

Please place this case on an open meeting agenda for the Commissioners' consideration. There is no jurisdictional deadline in this case. It is my understanding that you will be notifying me and the parties of the open meeting date, as well as the deadlines for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

Sincerely,


Janet R. Dewey
Administrative Law Judge

Enclosure

xc: All Parties of Record (without disk)

William P. Clements Building
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994
<http://www.soah.state.tx.us>

001

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**SOAH DOCKET NO. 473-03-3673
PUC DOCKET NO. 27709**

FILED
FEB 26 AM 10:45
PUBLIC UTILITY COMMISSION
PUBLIC CLERK

APPLICATION OF NPCR, INC. d/b/a NEXTEL PARTNERS FOR ELIGIBLE TELECOMMUNICATIONS CARRIER DESIGNATION	§ § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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SOAH DOCKET NO. 473-03-3673
PUC DOCKET NO. 27709

APPLICATION OF NPCR, INC. d/b/a	§	BEFORE THE STATE OFFICE
NEXTEL PARTNERS	§	
FOR ELIGIBLE	§	OF
TELECOMMUNICATIONS CARRIER	§	
DESIGNATION	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

NPCR, Inc. d/b/a Nextel Partners (NPCR or the Applicant) provides commercial mobile radio services (CMRS) throughout its service area in Texas. On April 28, 2003, NPCR filed an application for designation as an eligible telecommunications carrier (ETC) pursuant to 47 U.S.C. § 214(e) and P.U.C. SUBST. R. 26.418 so that it may receive support from the Federal Universal Service Fund (FUSF). NPCR requests designation in 44 non-rural study areas currently served by the local incumbent carrier (ILEC) GTE Southwest d/b/a Verizon Southwest, Inc. (Verizon). The Commission Staff (Staff), the Office of Public Utility Counsel (OPUC) and the Texas Telephone Association (TTA) oppose approval of the application in its entirety.

II. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

This matter was referred to the State Office of Administrative Hearings on June 26, 2003. Prior to referral, the Public Utility Commission of Texas (Commission) granted the motions to intervene filed by TTA and OPUC and found the notice of the application published in the May 9, 2003 issue of the *Texas Register* sufficient. The Applicant filed its direct testimony on July 25, 2003, which established an effective date of November 24, 2003. The hearing on the merits was held September 29 and 30, 2003. The parties did not contest notice or jurisdiction.

On October 9, 2003 the Commission heard the appeal of three orders issued on motions to compel discovery filed by TTA and OPUC. The Commission required NPCR to answer certain

discovery requests that the ALJ had previously denied. Based upon the Commission's determination to expand the scope of discovery to include four additional requests for information, the ALJ found good cause under P.U.C. PROC. R. 22.3 to find an exception from the requirement that the matter be decided within 120 days of the filing of the direct testimony. The hearing reconvened on December 16, 2003, and was adjourned the same day, although no party offered additional evidence. After the filing of final briefs, the record closed on January 23, 2004.

III. OVERVIEW OF THE FEDERAL UNIVERSAL SERVICE PROGRAM

The Federal Telecommunications Act of 1996 (FTA) required that the Federal Communications Commission (FCC) and the States adopt a mechanism for universal service support so that telecommunications costs would be affordable in all areas. 47 U.S.C. § 254(a)(1). In 1997, the FCC adopted the First Universal Service Order, in which it began the process of implementing Congress' directive to establish a universal service support mechanism with explicit state and federal subsidies to be provided to the particular carrier serving the actual customer.¹ The FCC further requires that the FUSF be competitively neutral, providing neither advantages nor disadvantages to particular service providers or technologies.²

To be an ETC, the applicant must: (1) be a common carrier as defined in 47 U.S.C. § 153(10); (2) must offer the specific services designated for FUSF support specified in 47 C.F.R. § 54.101(a)³ throughout the requested service area, through its own facilities, or a combination of

¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, ¶¶ 17-19, (Rel. May, 1997)(First Report and Order).

² *Id.* at ¶ 61.

³ The following service are designated for support: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling; (4) single-party service; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; (9) toll limitation for qualifying low-income consumers.

its own facilities and the resale of another carrier's services; and (3) must advertise the supported services throughout the service area. Where an applicant seeks designation in a rural ILEC's service area, the application must designate the entire ILEC service area, and the state commission must find that the designation of a second ETC is in the public interest. The PUC adopted these requirements in P.U.C. SUBST. R. 26.418. The Intervenor argues that the Applicant must also demonstrate that the designation is in the public interest for non-rural areas.

IV. DISCUSSION

The Commission's preliminary order of September 22, 2003, directed that the following issues be addressed in this proceeding:

1. With respect to designation as an ETC, does NPCR satisfy the requirements of P.U.C. SUBST. R. § 26.418?
2. For those areas served by rural telephone companies, would designation of NPCR as an ETC be in the public interest?⁴

A. The Criteria For Designation as an ETC Other than the Public Interest Test

To be eligible for FUSF support, a carrier must be an ETC. 47 C.F.R. § 54.201(a). To be an ETC the carrier must meet the requirements of 47 C.F.R. § 54.201(d). The Commission is responsible for designating a carrier as an ETC. 47 C.F.R. § 54.201(b). The federal requirements are incorporated in P.U.C. SUBST. R. 26.418(b), (c), and (d), which require the following:

⁴ The order cites to the Final Order adopted in *Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214(e) and PUC Subst. R. 26.418 and Application of WWC Texas RSA Limited Partnership Designation as an Eligible Telecommunications Provider Pursuant to 47 U.S.C. § 214(e) and PUC Subst. R. 26.417*, Consolidated Docket Nos. 22289 and 22295, Finding of Fact No. 72 and Conclusion of Law No. 27 (Oct. 30, 2000) (*WWC Texas*).

1. The carrier must offer the services that are supported by FUSF mechanisms, either using its own facilities or a combination of its own facilities and resale of another carrier's services.
2. The carrier must advertise the availability of and the charges for such services using media of general distribution.
3. The carrier must offer Lifeline Service to qualifying low income consumers and toll limitation services.
4. In an area served by a rural ILEC, the carrier must offer the supported services throughout the rural ILEC's service area.

B. Application of the ETC Designation Criteria

1. Common Carrier Status

The first requirement for ETC designation is common carrier status. 47 C.F.R. § 214(e)(1); P.U.C. SUBST. R. 26.418(c). Common carrier is defined as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such a person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(10). NPCR witness, Scott Peabody, an electrical engineer who is a director in the engineering department of Nextel Partners, Inc., testified that NPCR is a common carrier, as the specialized type of CMRS provided by NPCR Partners is a common carrier service under 47 C.F. R. § 20.9(a)(7).⁵ None of the parties dispute NPCR's status as a common carrier. The ALJ, therefore, finds that NPCR is a common carrier for purposes of obtaining ETC designation.

⁵ NPCR Ex. 1, Peabody Direct at 6.

2. Availability of Supported Services Throughout the Service/Study Areas

The ALJ finds that NPCR met its burden to demonstrate that it can offer the services supported by the FUSF throughout the areas served by the following rural telecommunications companies: Tatum Telephone Company, Blossom Telephone Company, Etex Telephone Cooperative, Inc., Cumby Telephone Cooperative, Inc., and Comanche County Telephone Company, Inc. The ALJ finds that NPCR has not demonstrated that it can offer the services throughout the areas served by the following rural telecommunications companies: Valley Telephone Cooperative, Inc., Border to Border Communications Inc., Riviera Telephone Company, Inc., Alenco Communications, Inc., Cameron Telephone Company, LaWard Telephone Exchange, Inc., Ganado Telephone Company, and United Telephone Company of Texas, Inc. d/b/a Sprint. Further, for the reasons set forth below, the ALJ finds that NPCR's evidence failed to demonstrate that it can offer the supported services throughout 44 non-rural study areas currently served by Verizon. While NPCR is not required to offer the services throughout the entire service areas of a non-rural ILEC, the evidence did not provide the ALJ a reasonable means of identifying the areas in which NPCR had shown sufficient capability and commitment to offer and provide the required services.

a. Applicable Standard

An applicant for ETC designation must show that it will make the supported services available to consumers throughout the requested designated service area.⁶ Under 47 U.S.C. § 214(e)(5), "service area" is defined as "a geographic area established by a State commission (or the [FCC] under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms." In the case of an area served by a rural telephone company, "service area" means the rural telephone company's study area, "unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section

⁶ 47 U.S.C. § 214(e)(1).

410(c) of this title, establish a different definition of service area for such company.”⁷ For an area served by a non-rural provider, there is no study area requirement and an ETC can be designated on an exchange basis.⁸

P.U.C. SUBST. R. 26.418(b) requires the applicant to provide the supported services throughout the service area it designates, in a non-rural area, or the entire “study” area if served by a rural telephone company. P.U.C. SUBST. R. 26.418(c) goes on to require that the applicant must offer the supported services using its own facilities, or a combination of its own facilities and resale of another carrier’s services, and also advertise the availability of and charges for such services using media of general distribution.

P.U.C. SUBST. R. 26.418(b) and (c), which are derived from 47 U.S.C. § 214(e)(1), have not been interpreted to require that the applicant offer “ubiquitous service” throughout the areas for which it seeks designation. As the FCC has found, an applicant for ETC designation must be given the same reasonable opportunity to develop its network as that afforded an ILEC:

We believe that requiring a prospective new entrant to provide service throughout a service area before receiving ETC status has the effect of prohibiting competitive entry in those areas where universal service support is essential to the provision of affordable telecommunications service and is available to the incumbent LEC. Such a requirement would deprive consumers in high-cost areas of the benefits of competition by insulating the incumbent LEC from competition.⁹

The FCC stresses that § 214(e)(1) requires that the applicant “offer the services. . .,” and does not

⁷ *Id.*; P.U.C. SUBST. R. 26.418(b)(2).

⁸ 47 U.S.C. § 214(e)(5); P.U.C. SUBST. R. 26.418(b)(1).

⁹ *In the Matter of Federal State Joint Board on Universal Service, Western Wireless Corporation Petitioner for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, Declaratory Ruling, DA 02-3181, ¶ 12 (rel. Nov. 27, 2002) (*Western Wireless*).

require “the actual provision of service prior to designation.”¹⁰ While the Commission’s rule is derived from the federal provisions, it requires that all services be “provided” when describing the rural and non-rural service areas. P.U.C. SUBST. R. 26. 418(b)(1). However, the FCC has clearly articulated that requiring an ETC applicant to *provide* the supported services throughout the service area prior to designation as an ETC does not fall within the safe harbor provisions of 47 U.S.C. § 253(b), which outline the extent of additional state regulation permitted in regulating the designation of ETCs:

To the contrary, we find that this requirement is not competitively neutral, consistent with section 254, or necessary to preserve and advance universal service. We therefore find that a requirement that obligates new entrants to provide supported services throughout the service area prior to designation as an ETC is subject to our preemption authority under section 253(d).¹¹

Western Wireless found that a new entrant must be allowed the same reasonable opportunity to provide service to requesting customers as the ILEC, and stated that a new entrant upon designation as an ETC is required to extend its network upon *reasonable request*.¹²

While *Western Wireless* finds that a carrier need not actually provide services throughout the requested service areas, the ruling cautions that a “demonstration of the capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service,” and that the carrier must “reasonably demonstrate its ability and willingness to provide service upon designation.”¹³ The decision outlines several methods for demonstrating ability and willingness, which included, but were not limited to the following:

¹⁰ *Id.* at ¶ 14.

¹¹ *Id.* at ¶ 26.

¹² *Id.* at ¶ 17.

¹³ *Id.* at ¶ 24.

(1) description of the proposed service technology, as supported by appropriate submissions; (2) a demonstration of the extent to which the carrier may otherwise be providing telecommunications services within the state; (3) a description of the extent to which the carrier has entered into interconnection and resale agreements; or, (4) a sworn affidavit signed by a representative of the carrier to ensure compliance with the obligation to offer and advertise the supported services.¹⁴

Therefore, the standard to be applied under *Western Wireless* is whether NPCR has demonstrated the capability and commitment to provide service upon reasonable request or, instead, has merely provided a vague assertion as to its intent to provide service.

b. NPCR's Position

NPCR was formed in 1998 to provide service in small and rural markets under the "Nextel" brand name. It is currently licensed by the FCC to provide CMRS in all or a portion of 13 economic areas in Texas. It began launching its service in Texas in the second half of 1999.¹⁵

NPCR relies on its signal propagation maps to demonstrate the extent of existing coverage throughout the requested service areas.¹⁶ NPCR provided the signal maps based on the assumption that the consumer would be using a three watt phone, which is not a handheld device, like a .6 watt phone, but involves a "shoebox" sized piece of equipment. Coverage maps showing signal propagation maps using a .6 watt phone showed much smaller areas of coverage.¹⁷

Mr. Peabody stated that NPCR will meet its obligation as an ETC to provide service throughout the designated areas upon reasonable request. Mr. Peabody further testified that NPCR

¹⁴ *Id.*

¹⁵ NPCR Ex. 1, Peabody Direct at 2-3.

¹⁶ NPCR Ex. 1, Peabody Direct, ex. SP-3 (rural ILECs) and ex. SP-4 (Verizon exchanges).

¹⁷ TTA Ex. 2, Robinson Supp. Direct, ex. WR-14.

is licensed throughout all of the areas in which it seeks ETC designation, and it is current on its “three and five year build-out requirements,” consistent with these licenses under federal law.¹⁸ NPCR maintains that it is not appropriate to require an ETC applicant to extend its service within a specific period of time, but rather it must provide service *upon reasonable request*. Mr. Peabody stated, for instance, it would not be reasonable for it to build a cell tower to serve one subscriber whose support would be \$10 per month.¹⁹

NPCR’s network uses a “packet-based platform,” the integrated “Digital Enhanced Network” developed by Motorola. According to NPCR, its all-digital technology provides exceptional sound and transmission quality, using state of the art methods capable of delivering Digital Cellular, “Direct ConnectSM Service” (a walkie-talkie service), Mobile Messaging and Internet access. It also provides GPS location assistance for customers dialing 911 where requested by the “Public Safety Answering Point.”²⁰ It intends to provide universal service offerings using the same antennae, cell sites, towers, trunk lines, mobile switching centers, and interconnection facilities used today. NPCR also regularly deploys additional cell sites and channels, as necessary, to maximize signal coverage and service availability.²¹ The record shows that NPCR currently has plans for five additional cell sites, in non-rural areas.²²

NPCR has interconnection arrangements with local telephone companies, including SBC Communications, Inc., GTE and Sprint, which permit NPCR’s Texas customers to make and receive calls on the public switched network within the FCC’s bandwidth.²³ NPCR reported that it is a

¹⁸ NPCR Ex. 3, Peabody Rebuttal. at 16.

¹⁹ Ex. Peabody Rebuttal at 17.

²⁰ NPCR Ex. 1, Peabody Direct at 15.

²¹ *Id.* at 10.

²² TTA Ex. 2, Robinson Supp. Direct at 7.

²³ NPCR Ex. 1, Peabody Direct at 7.

facilities based network and does not plan to rely upon the resale of any carrier's services to provide service.

NPCR offered no commitment as to how it would build out its network in order to eventually provide service throughout the requested service areas. Mr. Peabody testified that building out a wireless network can be a long process. Appropriate sites must be acquired, access negotiated, and then proper building and zoning permits must be obtained before cell site construction may commence. But he could not estimate how long it would take to fully extend the network. Mr. Peabody acknowledged the ILEC's obligation to meet service requests within 90 days, but explained that historically, and even currently, he believed, the ILECs have been able to pass through the costs of extending services.²⁴ Unlike the ILECs, which have had decades and hundreds of millions of dollars to build out their rural networks, Mr. Peabody contrasts this with NPCR who has had only four years and no subsidies.²⁵

c. The Intervenors' and Staff's Positions

The Intervenors and Staff maintain that NPCR has not met its burden to demonstrate that it will offer the services throughout the requested service areas. While they essentially agree that the standard is to demonstrate willingness and ability, as articulated in the FCC *Western Wireless* decision quoted above, they maintain that NPCR has shown only a vague assertion and that it should not be designated as an ETC.

TTA maintains that NPCR has not shown how it can or will provide the service throughout the services areas for which it seeks designation. TTA specifically points to the fact that NPCR has no plans to deploy additional cell sites within TTA's rural telephone company member service

²⁴ NPCR Ex. 3, Peabody Rebuttal at 19.

²⁵ *Id.* at 16.

areas.²⁶ And further, that it could take decades for NPCR to fully extend its facilities to meet requests for service.²⁷ It also argues that NPCR's obligation to provide services throughout the requested service area must mean something more than merely meeting reasonable requests for service, because that is the requirement for maintaining "common carrier" status under federal law.

TTA contends that NPCR's proposal to receive USF to subsidize the building out of its network is contrary to FCC decisions. TTA also claims that NPCR is not licensed throughout all of the rural study areas, and in cases where the applicant has been unable to serve the entire areas due to lack of licensing authority, the designation was dependent upon a redefinition of the service areas, subject to FCC and State Commission approval.

TTA's expert witness, Wesley Robinson, who specializes in providing consulting services to small competitive local exchange carriers, believed that the maps provided by NPCR showing the areas of coverage in Texas were "grossly overstated" because NPCR's signal propagation maps showed coverage with the use of a 3 watt phone, while only .6 watt phones are available through NPCR. Further, the cell site towers operate at 40 to 70 watts of power, instead of 70 watts of power as NPCR's maps assume, which also affects the signal's strength.²⁸ He maintained that NPCR's cell site towers are located in zip codes with denser population and if it receives FUSF, it will receive a windfall because it will not be serving the highest cost customers.²⁹³⁰

²⁶ TTA Ex. 2, Robinson Supp. Direct at 6-7.

²⁷ Tr. at 133.

²⁸ TTA Ex. 1, Robinson Direct at 33-34.

²⁹ See OPUC Posthearing Brief at 7.

³⁰ *Id.* at 38-39.

OPUC argues under the *Western Wireless* decision that NPCR has not reasonably demonstrated its capability and commitment to offer service upon designation but rather offered only a “vague assertion.” It maintains NPCR failed to demonstrate that it can meet reasonable requests for service upon designation. It additionally contends that NPCR has not demonstrated an intent to serve USF customers. It relies upon a review of NPCR’s Annual Report from 2002, which states that NPCR focuses on “high end” business customers, especially those with traveling colleagues. OPUC argues that NPCR’s current coverage areas demonstrate that the company’s focus is “midsize/tertiary markets and service to business traveling customers.” OPUC points to the location of the cell sites along major travel corridors and the fact that the cell towers have lower power/range (from less than 1 mile to 30 miles) along the corridors in order to reuse frequency channels.”³¹

OPUC additionally contends that NPCR’s now-expired rate plans do not seem tailored specifically for USF customers. Rather, OPUC believes that the phones offered by NPCR are designed to attract the business market, and NPCR has not provided any evidence or indicated an intention of addressing how it would counter the high cost of its equipment for USF customers. The lack of information provided by NPCR means the Commission has no basis to find that NPCR will offer quality service at just, reasonable, and affordable rates, in accordance with statutory universal service principles.³²

Staff essentially agreed with the Intervenor maintaining that NPCR had failed to demonstrate how it will meet its commitment to serve new customers upon reasonable requests once it receives ETC designation.

³¹ Tr. at 23-24.

³² See 47 U.S.C. § 254(b).

d. **Discussion and Analysis: Rural Study Areas**

The ALJ finds that NPCR has made a reasonable demonstration of its willingness and ability to offer the required services through the following rural telecommunications companies: Tatum Telephone Company, Blossom Telephone Company, Etex Telephone Cooperative, Inc., Cumby Telephone Cooperative, Inc, and Comanche County Telephone Company, Inc. The ALJ finds that FCC decisions, in particular *Western Wireless*, demonstrate a clear FCC policy that the services need not be provided throughout the services areas at the time of designation but may be made available upon reasonable request. While there are gaps of coverage within some of these service areas, NPCR's signal propagation maps reasonably demonstrate that NPCR can currently provide service throughout most of each of the study areas identified above, although service may require use of a three watt phone.³³ The ALJ finds that its current demonstrated coverage is sufficient to show that NPCR will offer service and provide service upon reasonable request.

While Mr. Robinson, TTA's witness, believed that the maps overstated NPCR's actual coverage, NPCR addressed these concerns in its rebuttal testimony. Mr. Peabody stated that whether a cell tower has 40 or 70 watts has no affect on the signal for a three watt phone, because the wattage of the handset is the limiting factor, not the strength of the signal from the tower. Additionally, factors such as terrain, antennae height, and other design parameters of the cell tower also affect signal propagation. Mr. Peabody concluded that Mr. Robinson appeared to have a limited and outdated understanding of signal propagation.³⁴ The ALJ finds that Mr. Peabody's qualifications as an electrical engineer give greater credence to his testimony on signal propagation than Mr. Robinson, whose apparent expertise is in the areas of regulatory issues and economics.

³³ See NPCR Ex. 1, Peabody Direct, ex. SP-3.

³⁴ NPCR Ex. 3, Peabody Rebuttal at 17-18.

Mr. Robinson testified that he did not believe that a consumer could obtain a three watt phone based upon his experience in trying to find one. Mr. Peabody acknowledged that there is not a plan with a three watt phone currently available on its web site, but he stated that NPCR planned to meet certain requests for service by offering the consumer a three watt phone--specifically the Motorola m370 and b370 three watt units.³⁵

For many of the study areas, particularly in South Texas and in West Texas, NPCR barely has any coverage at all in the areas for which it requests ETC designation. The ALJ finds that NPCR has limited coverage and has not demonstrated that it can offer the services throughout the areas served by the following rural telecommunications companies: Valley Telcoop, Border to Border, Riviera Telco-op, Alenco Communication, Cameron Telco, LaWard Tel Exchange, and Ganado Tel Co., and UTC of Texas.

Consistent with the *Western Wireless* case, the ALJ believes that a new entrant could reasonably demonstrate its willingness and ability to provide services, but NPCR has only offered vague assertions for these areas in which it now has limited or no coverage. While it plans to rely solely upon the use of its own facilities, it failed to offer any build-out plan or evidence of its build out capacity. The evidence showed that it had no current plans for any additional cell sites in rural areas, and it had no reasonable plan for how it would provide service over time other than to say that it could take decades.³⁶ In *WWC Texas*, the Commission found the applicant had equivalent or superior build-out capacity as the incumbents.³⁷ NPCR's only demonstration of its ability to meet future reasonable requests was the conclusory assurance that it would. Nor could it define what it considered to be a reasonable request, other than to say that it would not be reasonable to build a cell tower to serve one subscriber whose support would be \$10. Under the circumstances, NPCR's

³⁵ NPCR Ex. 3, Peabody Rebuttal at 17 and 19.

³⁶ Tr. at 133.

³⁷ *WWC Texas*, Finding of Fact No. 28.

conclusory statement that it would meet reasonable requests in all 22 study areas, with no explanation as to how it planned to accomplish this enormous undertaking, is only a vague assertion.

e. Discussion and Analysis: Non-Rural Service Areas

NPCR requested ETC designation in 44 non-rural exchanges currently served by Verizon.³⁸ Unlike a rural study area, there is no requirement that NPCR request designation in the entire non-rural service areas of the ILEC.³⁹ On a separate exhibit, NPCR listed the 44 exchanges.⁴⁰ NPCR provided an 8 x 11 signal propagation map, which fails to identify the applicable exchanges but rather shows its own coverage in red, overlaid upon Verizon's which is green and yellow.⁴¹ As is noted above, NPCR has little or no coverage in West and South Texas, but appears to have rather thorough coverage throughout Central Texas. NPCR's coverage in many of the areas appears to be sufficient to overcome its otherwise "vague assertions" as to its intent to provide service where it has little or no coverage. But based upon the limited evidence provided, the ALJ has no reasonable means to identify the areas in which NPCR has sufficient coverage to be identified an ETC, because NPCR failed to identify its coverage by exchange.

Therefore, the ALJ recommends that NPCR's application for ETC designation in 44 non-rural exchanges served by Verizon be denied. Alternatively, the Commission could remand this matter for the limited purpose of providing NPCR an opportunity to furnish a map that would identify the areas by exchange.

³⁸ NPCR Ex. 1, Peabody Direct, ex. SP-3 and 5.

³⁹ See P.U.C. SUBST. R. 26.418(b)(1).

⁴⁰ NPCR Ex. 1, Peabody Direct, SP-5.

⁴¹ NPCR Ex. 1, Peabody Direct, ex. SP-3 .

3. Advertisement of the Supported Services

Both 47 U.S.C. § 214(e)(1) and P.U.C. SUBST. R. 418(c)(2) require an applicant for ETC designation to advertise the availability of and charges for the universal service offerings using media of general circulation. Neither the FCC nor the Commission has adopted more specific advertising requirements for ETCs.

NPCR provided a detailed plan as to how it would accomplish advertising its services throughout the services areas. NPCR committed to use the same media of general distribution that it currently employs to advertise its universal service offerings throughout the designated services areas. Currently, the Nextel brand is advertised jointly by Nextel Partners and Nextel Communications through several different media, including newspaper, television, radio and billboard advertising. In Texas, NPCR advertises with Nextel Communications through media of general distribution, including newspaper, magazine, billboard and yellow page advertisements, as well as radio and television ads. In addition, NPCR advertises through point-of-sale marketing efforts at various wireless telecommunications and general electronic retail stores and over the Internet at www.nextel.com. NPCR also maintains various retail store locations throughout its authorized service areas, which provide an additional source of advertising. NPCR committed to use the same media of general distribution that it currently employs to advertise its universal service offerings throughout the designated services areas.⁴²

4. Service Offerings

Staff and the Intervenors argue that NPCR failed to provide sufficient evidence regarding its provision of the supported services because the rate plans, terms, and conditions upon which it based its application and testimony expired on September 30, 2003.

⁴² NPCR Ex. 1, Peabody Direct at 12-13, ex. SP-4.

The ALJ agrees with NPCR that it sufficiently demonstrated its willingness and ability to provide the each of the supported services. As the FCC has recognized, the applicant need only offer evidence that it is capable of and committed to providing the supported services upon designation:

Contrary to the arguments of the Alabama Rural LECs, [an ETC applicant] is not required to provide a detailed description of its planned universal service offerings beyond its commitment to provide, or statement that it is now providing, all of the services supported by the universal service support mechanism.⁴³

While Mr. Peabody did not have access to the post-September 30, 2003 service offerings at the hearing on the merits, he committed that the company would file, on a bi-annual basis, copies of the service offerings available directly from the company and to respond to any concerns the Commission may have regarding the Company's compliance with its ETC obligations.⁴⁴ The ALJ would also note that the applicant in *WWC Texas* had not yet determined the rates, terms, and conditions of its universal service offering at the time of designation.⁴⁵

5. Required Services in a Universal Service Offering

As is explained below, the ALJ finds that NPCR demonstrated its ability to offer each of the services set forth in 47 C.F.R. § 54.01 as is required by P.U.C. SUBST. R. 26.418.

⁴³ *In the Matter of Federal State Joint Board on Universal Service, Petition of RCC Holdings for Designation as an ETC in Alabama*, CC Docket no. 96-45, Memorandum Opinion and Order, DA 02-3181, ¶ 19 (rel. Nov. 27, 2002) (*RCC Holdings*).

⁴⁴ NPCR Ex. 1, Peabody Direct at 16-17; Tr. at 76-77.

⁴⁵ *Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214(e) and PUC Subst. R. 26.418 and Application of WWC Texas RSA Limited Partnership Designation as an Eligible Telecommunications Provider Pursuant to 47 U.S.C. § 214(e) and PUC Subst. R. 26.417*, Consolidated SOAH Docket No. 473-00-1167 and 473-00-1168; PUC Docket Nos. 22289 and 22295, Proposal for Decision at 14 (Oct. 13, 2000)(The ALJ noted the distinction between eligibility for designation versus the requirements for receiving FUSF funds.)

a. Voice Grade Access to the Public Switched Network

The FCC defines voice grade access to the public switched network “as a functionality that enables a user of telecommunications service to transmit voice communications, including signaling the network that the caller wishes to place a call, and to receive voice communications, including receiving a signal indication there is an incoming call. For purposes of this part bandwidth for voice grade access should be, at a minimum, 300 to 3,000 Hertz.”⁴⁶ No parties dispute NPCR’s provision of this service.

b. Local Usage

The FCC defines local usage as “an amount of minutes of use of exchange service, prescribed by the [FCC], provided free of charge to end users.”⁴⁷ To date, however, the FCC has not prescribed an amount of minutes.⁴⁸

TTA argues that NPCR’s plans essentially offer packages of minutes for a flat rate, which is the equivalent of a toll charge, and therefore, it fails to meet the definition of local usage.⁴⁹ TTA also argues that NPCR fails to offer local usage because neighbors who try to reach NPCR customers with non-local numbers will have to pay a toll charge.

The ALJ finds TTA’s arguments unpersuasive. First, completely free local calling does not exist, either with a landline company or a wireless company. The customer always pays for the

⁴⁶ 47 C.F.R. § 54.101(a)(1).

⁴⁷ 47 C.F.R. § 54.101(a)(2).

⁴⁸ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order and Order on Reconsideration, FCC 03-170 ¶ 14 (Rel. July 14, 2003) (FCC agrees with Joint Board that unlimited local usage is not essential to education, public welfare or public safety and requiring it would not serve the public interest.)

⁴⁹ TTA Ex. 1, Robinson Direct, ex. WR-49.

underlying service. Further, there is no language in the applicable Commission rules, or C.F.R. provisions that would require NPCR to offer unlimited local calling to all of its customers, only that it provide a certain amount of local calling free of charge. Without further clarification from the FCC on this issue, the ALJ finds that NPCR's practice of offering a block of minutes for a flat rate meets the current definition of local usage. Further, there is no requirement that NPCR offer toll-free calling to neighbors trying to reach a customer with a non-local number.

The ALJ concludes that NPCR will offer "local usage" consistent with 47 C.F.R. § 54.101(a)(2).

c. Dual Tone Multi-Frequency Signaling or Its Functional Equivalent

The FCC defines dual tone multi-frequency (DTMF) as "a method of singling that facilitates the transportation of signaling through the network, shortening call set-up time."⁵⁰ The FCC has determined that it is appropriate to treat the out-of-band signaling mechanisms employed by wireless carriers as a functionally equivalent alternative to DTMF signaling.⁵¹ No party disputed NPCR's provision of this service.

d. Single Party Service or Its Functional Equivalent

The FCC defines single-party service as "telecommunications service that permits users to have exclusive use of a wireline subscriber loop or access line for each call placed, or, in the case of wireless telecommunications carriers, which use spectrum shares among users to provide service,

⁵⁰ 47 C.F.R. § 54.101(a)(3).

⁵¹ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order FCC 97-157 (May 7, 1997) (1997 Universal Service Order).

a dedicated message path for the length of a users' particular transmission.⁵² No party disputed NPCR's provision of this service.

e. Access to Emergency Services

The ALJ finds that NPCR provides access to emergency services in accordance with 47 C.F.R. § 54.101(a)(5).

i. General Discussion of 911

The FCC defines access to emergency services as follows:

[A]ccess to services, such as 911 and enhanced 911, provided by local governments or other public safety organizations. 911 is defined as a service that permits a telecommunications user, by dialing the three-digit code "911," to call emergency services through a Public Service Access Point (PSAP) operated by the local government. "Enhanced 911" is defined as 911 service that includes the ability to provide automatic numbering information (ANI), which enables the PSAP to call back if the call is disconnected, and automatic location information (ALI), which permits emergency service providers to identify the geographic location of the calling party. "Access to emergency services" includes access to 911 and enhanced 911 services to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems.⁵³

Staff recommends that NPCR's application be denied because it failed to establish that it can and will provide 911 service to all of its customers. Ms. Janis Ervin, Senior Policy Specialist in the Telecommunications Division of the Public Utility Commission, believed that while NPCR has complied with the letter of the FCC provisions governing enhanced 911 (E911) service, it has failed to show that it can and will provide the services throughout the requested service areas. Also, Staff

⁵² 47 C.F.R. § 54.101(a)(4).

⁵³ 47 C.F.R. § 54.101(a)(5).

maintains that the Commission has authority to require additional criteria for ETC designation under the public interest section of its rule. To the extent that Staff makes this argument, it will be addressed in the public interest section below.

Staff's main concerns stem from the fact that NPCR could not implement nineteen requests for Phase I E911, which NPCR terms as "no action required." Staff argues that the nineteen requests requiring no action means "NPCR did not have a cell tower in the PSAP's region, even though NPCR was providing service to consumers in that region, and that this shows they are not willing or able to provide access to emergency services throughout the area."⁵⁴

The ALJ disagrees with Staff and finds that NPCR's access to emergency services meets the requirements of 47 C.F.R. § 54.101(a)(5). NPCR explained that it is compliant with all FCC regulations relating to the access to emergency services, and that its inability to implement nineteen PSAP requests related to either a lack of a cell tower in the region or, that its cell site covers more than one PSAP. Further, Mr. Robinson, TTA's expert, stated that neither of these situations would affect NPCR's compliance with the federal rules.⁵⁵

NPCR's own expert, Mr. Scott Peabody, explained a scenario in which several PSAPS were located within a single cell tower's coverage area. According to Mr. Peabody, the PSAPs, he explained, in conjunction with Intrado and NPCR work to decide which PSAP would get 911 calls, because a cell tower can only route 911 calls to one PSAP regardless of the caller's location within that region. The PSAPs then determine whether the call is routed to another PSAP, according to agreements among the PSAPs. It is, therefore, possible that a customer's 911 call could be routed to PSAP which is more geographically distant than a closer PSAP.

⁵⁴ Staff Brief at 6.

⁵⁵ Tr. at 226-27.

It is also possible that the PSAP could make a request for emergency services in an area in which NPCR did not provide coverage. But unlike the scenario identified by Staff, NPCR explained that if it is providing service in a region, then a customer's 911 call will be routed to a PSAP. Indeed, access to emergency services is a prerequisite to "turning up" a cell site.⁵⁶ The call may not be routed to the PSAP which is geographically closest to the caller, but the call will get through to a PSAP to the extent there is service. NPCR stated clearly that all "no action" requests occurred in situations in which there was no further action to take and the company could not implement.⁵⁷

Western Wireless recognized that an applicant need not provide the specified universal services, including access to emergency service, throughout the designated service areas at the time of the application. Staff's argument relates to NPCR's ability and willingness to provide the services throughout the designated services areas, rather than the technical specifications identified in 47 C.F.R. § 54.101(a)(5). The ALJ has found above that NPCR met the requirement to offer the services within the specific study areas identified above based upon the articulated policy of the FCC in the *Western Wireless* order. Further, NPCR's current practice of routing all 911 calls received by a single cell tower to one PSAP, regardless of the geographical location of the caller, does not conflict with 47 C.F.R. § 54.101(a)(5).

ii. Phase II E911

The ALJ additionally finds that NPCR has implemented Phase II E911, which provides for geographic location of the calling party to the extent possible. For those requests that are pending, NPCR clearly stated in an answer to a request for information that the implementation delays are caused by the requesting PSAPs, not NPCR.⁵⁸ Since October 1, 2004, when it was initially required,

⁵⁶ Tr. at 86-87.

⁵⁷ See tr. at 106-7.

⁵⁸ TTA Ex. 1, Robinson Direct, exs. WR-30 and 31.

NPCR has implemented Phase II E911 in four counties.⁵⁹ NPCR further stated that its network is fully capable of providing Phase II E911 and that it has not missed any federal deadlines relating to implementation.⁶⁰

iii. Text Telephone Devices and Hearing Aids

TTA's argument that NPCR fails to provide access to emergency service because it has not demonstrated that its network accommodates TTY or hearing aid devices also fails. As previously found in a prehearing order relating to NPCR's request to provide supplemental testimony, this issue is not relevant in considering an application for ETC designation. "Access to emergency services" as defined in 47 C.F.R. § 54.101(a)(5) simply does not require demonstration that its network accommodate TTY or hearing aid devices. While 47 C.F.R. § 20.18 requires CMRS licensees to be capable of "transmitting 911 calls from individuals with speech or hearing disability through means other than mobile radio handsets, e.g., the use of Text Telephone Devices (TTY)," it is a federal licensing provision applicable to CMRS providers, but not specifically contained within the requirements for ETC designation. Further, the FCC has stated that Braille TTYs, which are customer premises equipment, are ineligible for universal service support because 47 U.S.C. § 254(c) expressly limits the definition to "telecommunications services."⁶¹

NPCR's burden in this matter cannot logically include demonstrated compliance with every federal licensing provision that applies to CMRS providers, unless specifically identified in the federal statutes and state rules governing designation of eligible telecommunications carriers.

⁵⁹ NPCR Ex. 3, Peabody Rebuttal at 7.

⁶⁰ NPCR Ex. 3, Peabody Rebuttal at 7.

⁶¹ See *July, 2003 Universal Service Order* at ¶ 22.

iv. Conclusion

The ALJ finds that NPCR is providing emergency access services and enhanced emergency access services to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems in accordance with 47 C.F.R. § 54.101(a)(5).

f. Access to Operator Services

In 47 C.F.R. § 54.101(a)(6), the FCC defines access to operator services as "access to any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call." No party disputes NPCR's provision of this service.

g. Access to Interexchange Service

The FCC defines access to interexchange service as "the use of the loop, as well as that portion of the switch that is paid for by the end user, or the functional equivalent of these network elements in the case of a wireless carrier, necessary to access an interexchange carrier's network."⁶² In other words, a universal service provider must offer consumers access to interexchange service to make and receive interexchange or "toll" calls. NPCR maintains that it meets this requirement by providing all Texas customers with the ability to make and receive interexchange calls through direct interconnection arrangements with several interexchange carriers, and also by offering NPCR customers the ability to reach their interexchange carrier (IXCs) of choice by dialing the appropriate access code.⁶³

⁶² 47 C.F.R. § 54.101(a)(7).

⁶³ NPCR Ex. 3, Peabody Direct at 9.

No party argued in briefing that NPCR failed to offer this service; however, Mr. Bruce Nesbit, OPUC's witness, maintained in his testimony that NPCR should be required to provide "equal access" to presubscribed interexchange carriers under the public interest criteria.⁶⁴

NPCR provides access to interexchange service and is not required to provide equal access to all IXC's. Indeed, 47 U.S.C. § 332(c) provides CMRS carriers are specifically not required to provide equal access to common carriers for the provision of telephone toll service.

h. Access to Directory Assistance

The FCC has defined access to directory assistance as "access to a service that includes, but is not limited to, making available to customers, upon request, information contained in directory listings."⁶⁵ No party disputes NPCR's provision of this service.

i. Toll Limitation for Qualifying Low-Income Consumers

The FCC also conditions eligibility for federal support upon a carrier's provision of toll limitation for qualifying low-income consumers. 47 C.F.R. § 54.101(a)(9). A "qualifying low-income consumer" is "a consumer who meets the low-income eligibility criteria established by the state commission, or, in states that do not provide state Lifeline support, a consumer who participates in one of the following programs: Medicaid; food stamps; supplemental security income; federal public housing assistance; or Low-Income Home Energy Assistance Program."⁶⁶ Toll limitation denotes either toll blocking or toll control for eligible telecommunications carriers that are incapable of providing both services. For ETCs capable of providing both services, "toll limitation" denotes both toll blocking and toll control. Toll blocking is "a service provided by carriers that lets

⁶⁴ OPUC Ex. 2A, Nesbit Direct at 5.

⁶⁵ 47 C.F.R. § 54.101(a)(8)

⁶⁶ 47 C.F.R. § 54.101(a)(9).

consumers elect not to allow the completion of outgoing toll calls from their telecommunications channel.”⁶⁷ Toll control is “a service provided by carriers that allows consumers to specify a certain amount of toll usage that may be incurred on their telecommunications channel per month or per billing cycle.”⁶⁸

No party controverted NPCR’s ability or commitment to offer toll-blocking to qualifying Lifeline consumers.

6. Offering Lifeline and LinkUp Service

P.U.C. SUBST. R. § 26.418(d)(2) requires that in order to receive federal universal service support, the carrier must offer Lifeline Service in compliance with 47 C.F.R. § 54.400 (relating to Terms and Definitions) and § 54.401 (relating to Lifeline defined). The rule also requires that the applicant offer Lifeline Service to qualifying low-income consumers in compliance with 47 C.F.R., Part 54, Subpart E. P.U.C. SUBST. R. § 26.418(g)(1)(C)(ii).

Staff, TTA, and OPUC maintain that NPCR has not met its burden to demonstrate a serious commitment to offer Lifeline service to qualifying low-income customers. Specifically, they point to the potential for a service deposit of up to \$500 based upon credit scores and phones that are very expensive. Further, they argue that NPCR targets high-end business customers who are traveling, not low income consumers. Staff additionally maintains that NPCR failed to provide informational tariffs and to meet the other requirements provided for in P.U.C. SUBST. R. 26.412, as occurred in the *WWC Texas* proceeding. For these reasons, the Intervenors and Staff argue that NPCR failed to demonstrate its willingness and ability to provide service under the Lifeline and LinkUp programs.

⁶⁷ *Id.*

⁶⁸ 47 C.F.R. § 54.400.

The ALJ finds that NPCR met its burden to demonstrate that it will offer Lifeline and LinkUp Service to qualifying low-income consumers in compliance with 47 C.F.R., Part 54, Subpart E. Mr. Peabody stated in his prefiled testimony:

Nextel Partners will comply with all state and federal requirements that apply to ETCs. We will offer qualifying low income consumers Lifeline and LinkUp discounts, will offer toll blocking free of charge, and will not collect a service deposit from Lifeline customers who choose to block toll. In addition, Nextel Partners will comply with the automatic enrollment and disconnection prohibitions in P.U.C. Subst. R. 26.412. As a CMRS provider that does not file tariffs with state regulatory commissions, the company does not believe that the tariff provision of P.U.C. Subst. R. 26.412(g) applies to Nextel Partners. If that is determined to apply, Nextel Partners will file such a tariff.⁶⁹

Neither the State or federal requirements contain prohibitions against a deposit, except in the case of a Lifeline customer who has elected toll-blocking. *See* 47 C.F.R. § 54.401(c). Further, the requirement to file tariffs and other requirements provided in P.U.C. SUBST. R. 26.412 apply to carriers receiving support from the Texas Universal Service Fund, not from the FUSF.

7. Public Interest Determination in Rural Areas

The ALJ finds that the designation of NPCR as an ETC in the specific rural areas in which NPCR demonstrated the requisite capability and commitment to provide services throughout the study area is in the public interest. This determination is guided primarily by the universal service principles articulated in 47 U.S.C. § 254(b), the Commission's previously stated findings and policies regarding competition, and its silence on many of the policy considerations raised by Staff and the Intervenor. The ALJ recognizes that policies articulated in 2002, when the *WWC Texas* order was issued, may have evolved and new considerations in this arena may be appropriate. For instance, impact on the fund size and the commensurate impact on consumer surcharges due to

⁶⁹ NPCR Ex. 3, Peabody Rebuttal at 14.

increased participation in the FUSF in rural areas could be an important factor to consider in an ETC designation process. However, the Commission risks piecemeal determinations if it articulates standards within individual ETC designation proceedings, rather than adopting consistent, coherent policies and rules applicable to all ETC applicants and designees prospectively.

P.U.C. SUBST. R. 26.418(e)(2) and 47 U.S.C. § 214(e)(2) require the Commission to determine whether the designation of an additional ETC in an area served by a rural telephone company is in the public interest. The Preliminary Order issued in this matter specifically requested that the ALJ find whether designation of NPCR as an ETC would be in the public interest for those areas served by rural telephone companies and cites to the Final Order adopted in *WWC Texas* at Finding of Fact No. 72 and Conclusion of Law 27, which read as follows:

72. Subjecting WWC to a public interest test based in part on the effect of the designation on the incumbent providers is not competitively neutral, in that it favors the incumbent provider.

...

27. The Commission's analysis of the public interest is guided by the fundamental goal of preserving and advancing universal service, and the component goals of ensuring the availability of quality telecommunications services at just, reasonable, and affordable rates, and the deployment of advanced telecommunications and information services to all regions of the Nation, including rural and high cost areas.

Additionally, in designating WWC as an ETC and an ETP, the Commission clearly articulated a policy position in favor of increasing competition:

As a matter of public policy, this Commission's actions should ensure that people have competitive opportunities they did not have before, not resulted [sic] in people losing existing competitive opportunities. Designating WWC an ETC and ETP will afford people both choice for a local exchange carrier and increased access to enhanced services. As a result, customers in Texas are more likely to have lower prices, higher quality, and the rapid deployment of new telecommunications

technologies. In addition, the Commission is unwavering in its support of a simple proposition: Rural Texans are not second class citizens and should not be deprived of competitive alternatives or access to new technologies.⁷⁰

In the granting of an individual ETC designation, the FCC recently applied a new balancing test as to whether the benefits of an additional ETC in rural study areas outweigh any potential harm:

In determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame.⁷¹

In another matter decided by the FCC, *RCC Holdings*, the FCC found that designation of a an applicant as an ETC could provide benefits to rural consumers that were not available from the incumbent carriers. It pointed to larger local calling areas from the wireless carrier, no toll charges, and a commitment to offer a variety of local usage plans as part of its universal service offering. Conversely, it concluded that consumers would not be harmed by the designation, finding that the applicant has demonstrated both commitment and ability to service any requesting customer within the designated service area using its own facilities, and could adequately serve the affected areas, even if the incumbent were to relinquish its designation.⁷² In this order, the FCC did not believe that impact on the fund was an appropriate consideration in the context of a single designation proceeding.⁷³

⁷⁰ *WWC Texas* at 2.

⁷¹ *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*; CC Docket No. 96-45, FCC-03-338, (rel. Jan. 22, 2004) at ¶. 27 (*Virginia Cellular*).

⁷² *RCC Holdings* at ¶ 25.

⁷³ *Id.* at ¶ 32; see also *Cellular South License, Inc. Petition for Designation as an Eligible Telecommunications Carrier throughout its Licensed Service Area in the State of Alabama*; CC Docket No. 96-45,

Staff and the Intervenor argue that designation of NPCR as an ETC is not in the public interest. OPUC maintains that NPCR failed to agree to comply with the Commission's consumer protection standards if it is designated an ETC. The now-expired terms and conditions documents include cancellation fees, deposit requirements, and late fees, all of which are more burdensome to the consumer than the rights and obligations delineated in the Commission's rules. OPUC also maintains that NPCR should be obligated to follow the Commission's quality of service rules: PUC. SUBST. R. 26.52, 26.53 and 26.54. These rules cover emergency operations and backup power requirements, inspections, and tests, and include service objectives and performance benchmarks.

Staff also contends that designation of NPCR is not in the public interest. Staff maintains that the application should be denied based upon NPCR's failure to demonstrate willingness and capability to serve the designated areas, and also because the expiration of its rates, terms, and conditions documentation filed with the original documentation expired on September 30, 2003, and there is no way to evaluate the potential benefit to consumers in designating NPCR as an ETC. As explained above, Staff additionally contend, NPCR's application should be denied because it believes NPCR has not adequately committed to providing 911 and E911 through the requested service areas.

TTA maintains that no goal of universal service is furthered by designating NPCR as an ETC, only NPCR's economic interest. TTA believes that the public interest test adopted in the Commission's *WWC* order is "simplistic" in that it looks only to competition to determine whether the designation is in the public interest. TTA argues that the Commission should consider more than simply enhancing competition, because a designation of an additional carrier would then always be in the public interest. TTA maintains that NPCR has no plans for further capital investment after

ETC designation, relying upon NPCR's 2003 Annual Report to investors, which states that its build-out is complete.⁷⁴

All of the parties agree that the Commission has a great deal of authority in the designation process to adopt additional requirements.⁷⁵ Indeed, 47 U.S.C. § 253(b), in removing barriers to entry in intrastate and interstate telecommunications service, expressly provides:

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Notwithstanding the State's authority to adopt additional requirements in ETC proceedings, the ALJ finds nothing to indicate that the Commission has adopted or intends to adopt additional requirements in these proceedings other than those that appear in the plain language of the rule and the Commission's Preliminary Order in this matter.

The ALJ concludes that designation of NPCR as an ETC in the rural areas designated above is in the public interest. NPCR has committed that it will provide the same services and prices in rural areas as it does in urban areas. NPCR's commitment to offer the same rates as it does in highly competitive⁷⁶ urban areas, indicates that its rates in rural areas will be "just, reasonable, and affordable."⁷⁷ Additionally, the FCC and the Commission have previously found that competition

⁷⁴ See TTA Ex. 2, WR-56 at 37.

⁷⁵ 47 U.S.C. § 253(b) See *July, 2003 Universal Service Order* at ¶. 29 (FCC agreed with the Joint Board that it should not impose technical or service quality standards as a condition to receive universal service support finding no reason to supplant the states' role of implementing and enforcing technical and service quality standards).

⁷⁶ NPCR Ex. 3, Peabody Rebuttal at 27.

⁷⁷ Under 47 U.S.C. § 332(c)(3) no State may regulate the entry or the rates charged by any commercial mobile service. Only if the commercial mobile service carrier's services are a substitute for landline telephone for a substantial

further the goals of universal service and provides the consumer with a greater choice of providers and services, which will in turn result in market-driven prices and quality.⁷⁸ Further, NPCR's commitment to provide the same service and prices in rural areas as it does in urban areas meets another separate and equally important goal of universal service.⁷⁹

NPCR provided some specific evidence of the quality of its services, although it did not agree to comply with the Commission's quality of service rules identified in P.U.C. SUBST. R. 26.417. NPCR stated that it has one of the highest customer satisfaction and customer retention ratings in the industry.⁸⁰ An industry trade group, J. D. Powers, recently ranked NPCR as number one in customer satisfaction.⁸¹ Mr. Peabody testified that NPCR's number one company goal is customer satisfaction and that this is fundamental within the culture of the company. NPCR also contends that its all digital technology provides exceptional sound and transmission quality.⁸²

portion of the State, or if the State specifically petitions the FCC and obtains authorization, may the State regulate CMRS rates. While the State has no authority to *regulate* NPCR's rates to ensure that they are "just, reasonable and affordable" that should be differentiated from a situation in which the regulator may look to the reasonableness of the rates in determining whether the Carrier is entitled to a subsidy.

⁷⁸ *In the Matter of Western Wireless Corp. Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, CC Docket 96-45, Memorandum Opinion and Order, FCC 01-283 ¶¶ 12 (rel. Oct. 5, 2001) ("Designation of qualified ETCs promotes competition and benefits consumers by increasing customer choice, innovative services, and new technologies" and "provision of competitive service will facilitate universal service to the benefit of . . . [consumers] by creating incentives to ensure that quality services are available at 'just, reasonable and affordable rates.'"); *see also WWC Texas Order* at 2.

⁷⁹ 47 U.S.C. § 254(b)(3) provides: "Consumers in all regions of the Nation including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas."

⁸⁰ NPCR Ex. 1, Peabody Direct at 16.

⁸¹ Tr. at 95.

⁸² NPCR Ex. 1, Peabody Direct at 15.

NPCR demonstrated that it would offer expanded local calling areas, mobility of voice, messaging, e-mail, and data services, nationwide long distance, its "DirectConnect" service (a national walkie-talkie service), no roaming charges throughout the nation, and mobile 911 as well as global positioning system location assistance for customers dialing 911 wherever the local PSAP has made a request and implemented Phase II E911 service.⁸³

In considering quality, ability to adequately serve the affected areas, commitment to offer the same rates and service in rural areas that it provides in urban areas, in combination with the lack of harm to consumers demonstrated by Staff or the Intervenors and the Commission's stated policy that competition and provision of enhanced services will positively affect quality and rates, the ALJ finds designation of NPCR as an eligible telecommunications carrier in the specific areas identified above is in the public interest.

The ALJ finds that the quality rules identified in P.U.C. SUBST. R. 26.417 do not apply in ETC designation proceedings. While the Commission has authority to impose rules regarding quality of service upon ETC designees, it has not done so. Unlike P.U.C. SUBST. R. 26.417, which governs the designation of "eligible telecommunications providers" for the Texas Universal Service Fund, P.U.C. SUBST. R. 26.418 does not contain any requirement that an ETC comply with any consumer protection or quality provisions. The ALJ believes that if the Commission had intended these provisions to apply to ETC designees for FUSF, it would have articulated this requirement in P.U.C. SUBST. R. 26.418.

The ALJ also finds that the consumer protection standards identified in P.U.C. SUBST. R. 26.21(a) do not apply to NPCR. In *WWC Texas*, the Commission found that P.U.C. SUBST. R. 26.21(a), which refers to provisions relating to refusal of service, credit requirements and deposits, bill payment and adjustments, and suspension and disconnection of service, applied to the

⁸³ *Id.*, and Rebuttal at 29 and 32.

applicant because it offered “basic local telecommunications service.” The rule, however, is clear that it only applies to “certificated telecommunications utilities” (CTUs). A CTU is “a telecommunications utility that has been granted either a certificate of convenience and necessity (CNN), a certificate of operating authority (COA), or a service provider certificate of operating authority (SPCOA).”⁸⁴ But for this requirement, the ALJ finds that these consumer protections would be applicable to NPCR because NPCR offers local service as a part of its universal service offering.⁸⁵ In this matter, the ALJ has no basis for finding that NPCR is a CTU, and therefore, declines to apply these consumer protection standards.

8. Public Interest Determination in Non-Rural Areas

The ALJ declines to make specific findings on this topic for the reasons set forth below.

While “public interest” is not contained within the criteria to be applied in determining eligibility for non-rural areas in P.U.C. SUBST. R. 26.418, the term appears in 47 U.S.C. § 214(e), which states in part:

Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an areas served by a rural telephone company, and shall in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph.

In a 2000 decision, the FCC found that designation of an additional ETC based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of section

⁸⁴ P.U.C. SUBST. R. 26.5(36).

⁸⁵ While *WWC Texas* found that the applicant offered basic local service, the rule applies to CTUs that provide local service, and it does not specifically reference basic local service. See *WWC Texas*, Finding of Facts 76 and 77.

214(e)(1) is consistent *per se* with the public interest.⁸⁶ In a recent decision, the FCC stated, in commenting on this previous order, that it did not “believe that designation of an additional ETC in a non-rural telephone company’s study area based merely upon a showing that the requesting carrier complies with section 214(e)(1) of the Act will necessarily be consistent with the public interest in every instance.”⁸⁷ The Commission found that the carrier in this matter met the public interest standard because it satisfied the more rigorous public interest analysis for the rural study areas, and that it demonstrated detailed commitments to provided high quality service throughout all of the proposed areas.⁸⁸ The Commission additionally noted that the Joint Board is reviewing whether to modify the public interest analysis used to designate ETCs in both rural and non-rural carrier study areas under 47 U.S.C. § 214(e)(1).

In *WWC Texas*, the Commission did not make any finding that designation of the applicant in non-rural areas was in the public interest, and therefore, at least at that time, the Commission did not believe that this was a necessary consideration. Further, the Preliminary Order in this matter only requested a public interest determination for rural areas and did not mention non-rural areas. Nor is “public interest” referred to in discussing the designation of more than one ETC in non-rural areas in P.U.C. SUBST. R. 26.418, signaling the Commission’s intent that public interest is not a required showing in non-rural areas.

The Intervenors and Staff argue that the Commission must consider the public interest in the designation of an ETC in non-rural areas under 47 U.S.C. § 214(e)(1). While the ALJ is not convinced that public interest is a required finding, having found that designation in the rural areas

⁸⁶ *Cellco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier*, CC Docket No. 96-45; FCC 00-2895 (rel. Dec. 26, 2000) at ¶. 14.

⁸⁷ *Virginia Cellular* at ¶. 27.

⁸⁸ *Id.*

is in the public interest, it would logically follow that designation of NPCR as an ETC in non-rural areas would also be in the public interest.⁸⁹

The ALJ, however, is not prepared to make such a finding in this Proposal for Decision because the public interest determination for rural areas was partially premised on NPCR's ability to provide coverage throughout most of the service areas. Because the ALJ could not make such a determination for non-rural areas due to the nature of the evidence provided, the ALJ is not prepared to make any public interest determination for non-rural areas, leaving aside whether this is a required finding or not..

V. RECOMMENDATION

In summary, the ALJ finds that NPCR meets all of the technical requirements for ETC designation with the exception of its willingness and ability to serve these areas served by the following rural telephone companies: Valley Telephone Cooperative, Inc., Border to Border Communications Inc., Riviera Telephone Company, Inc., Alenco Communications, Inc., Cameron Telephone Company, LaWard Telephone Exchange, Inc., Ganado Telephone Company., and United Telephone Company of Texas, Inc. d/b/a Sprint.

Therefore, the ALJ recommends that NPCR's application for ETC designation be granted in the study areas served by the following rural telephone companies: Tatum Telephone Company, Blossom Telephone Company, Etex Telephone Cooperative, Inc., Cumby Telephone Cooperative, Inc, and Comanche County Telephone Company, Inc. .

⁸⁹ *See id.*

**VI. FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND
PROPOSED ORDERING PARAGRAPHS**

A. Findings of Fact

1. NPCR, Inc. d/b/a Nextel Partners (NPCR) is a telecommunications carrier that provides commercial mobile radio service (CMRS) in Texas.
2. On April 28, 2003, NPCR filed an application with the Public Utility Commission of Texas (Commission) for designation as an Eligible Telecommunications Carrier (ETC) pursuant to 47 U.S.C. § 214(c), so that it could seek support from the Federal Universal Service Fund (FUSF).
3. NPCR requests designation in 44 non-rural exchanges currently served by the local incumbent carrier (ILEC), GTE Southwest dba Verizon Southwest, Inc. NPCR also seeks designation in 22 rural study areas served by 22 different rural telephone companies.
4. On May 29, 2003, Texas Telephone Association (TTA) filed a motion to intervene. Also on May 29, 2003, the Office of Public Utility Counsel (OPUC) filed a motion to intervene. Both interventions were granted.
5. On June 26, 2003, the Commission referred NPCR's application to the State Office of Administrative Hearings (SOAH) for a hearing on the merits.
6. NPCR filed its direct testimony on July 25, 2003, which established an effective date of October 23, 2003, pursuant to P.U.C. SUBST. R. 26.418(g)(2)(D).
7. The Commission issued a preliminary order on September 22, 2003.
8. The evidentiary hearing on the merits was held on September 29 and 30, 2003.
9. On October 9, 2003 the Commission heard the appeal of three orders issued on motions to compel discovery filed by TTA and OPUC. The Commission required NPCR to answer certain discovery requests that the ALJ had previously denied.
10. Based upon the Commission's determination to expand the scope of discovery to include four additional requests for information, the ALJ found good cause to find an exception from the requirement that the matter be decided within 120 days of the filing of the direct testimony.

11. The hearing reconvened on December 16, 2003 and was adjourned the same day. After the filing of final briefs, the record closed on January 23, 2004.
12. NPCR is a common carrier.
13. NPCR is federally licensed throughout all of the areas in which it seeks ETC designation.
14. NPCR will offer the specific services designated for FUSF support specified in 47 C.F.R. § 54.101 (supported services):
 - a. voice grade access to the public switched network;
 - b. local usage;
 - c. dual tone multi-frequency signaling or its functional equivalent;
 - d. single party service or its functional equivalent;
 - e. access to emergency services;
 - f. access to operator services;
 - g. access to directory assistance; and
 - h. toll limitation for qualifying low-income consumers.
15. NPCR can and will make the supported services available throughout the requested study areas served by the following rural telephone companies: Tatum Telephone Company, Blossom Telephone Company, Etex Telephone Cooperative, Inc., Cumby Telephone Cooperative, Inc, and Comanche County Telephone Company, Inc. .
16. NPCR did not reasonably demonstrate its capability and commitment to offer service upon designation in the study areas served by the following rural telephone companies: Valley Telephone Cooperative, Inc., Border to Border Communications Inc., Riviera Telephone Company, Inc., Alenco Communications, Inc., Cameron Telephone Company, LaWard Telephone Exchange, Inc., Ganado Telephone Company., and United Telephone Company of Texas, Inc. d/b/a Sprint.
17. NPCR was unable to identify its build-out capacity, any build-out plan, the length of time it could take to build out its network, or any other reasonable demonstration of its capability and commitment to provide service throughout areas in which it had limited or no coverage; therefore, for the rural study areas identified in Finding of Fact No. 26, NPCR has only offered a vague assertion of intent to provide service.
18. NPCR failed to demonstrate its current coverage in the areas currently serviced by GTE-SW d/b/a Verizon SW, Inc. (Verizon) by exchange. There is, therefore, no reasonable means of identifying the areas in which NPCR currently has sufficient coverage to overcome its failure

to reasonably demonstrate its capability and commitment to provide service in those areas where it has little or no coverage.

19. NPCR can and will advertise the availability of and charges for the supported services using media of general distribution.
20. NPCR will offer Lifeline and LinkUp service to qualifying low-income consumers.
21. NPCR committed that it would offer the same services and prices in rural areas as it does in more competitive urban areas. This commitment indicates that its rates in rural areas will be just, reasonable, and affordable.
22. Competition furthers the goals of universal service and provides the consumer with a greater choice of providers and service choices, which will in turn result in market-driven prices and quality.
23. Designating NPCR and ETC will afford people increased choice for telecommunications service and increased access to enhanced services. As a result, customers in Texas are more likely to have lower prices, higher quality, and the deployment of new telecommunications technologies.
24. NPCR's wireless service will offer expanded local calling areas, mobility of voice, messaging, e-mail, and data services, nationwide long distance, and "direct connect service" (a walkie-talkie service), no roaming charges throughout the nation, and mobile 911 as well as global positioning system location assistance by dialing 911, to the extent that the local Public Safety Access Point has made a request and implemented Phase II E911 service.
25. Designation of NPCR in study areas of the rural telephone companies identified in Finding of Fact No. 24 is in the public interest.

B. Conclusions of Law

1. The Commission has jurisdiction over this docket pursuant to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Act), 47 U.S.C. § 214(e)(6), and the Public Utility Regulatory Act (PURA) §§ 52.001 *et seq.*
2. The notice provided in this docket is sufficient, pursuant to P.U.C. PROC. 22.55 and P.U.C. SUBST. R. 26.418(g)(1).

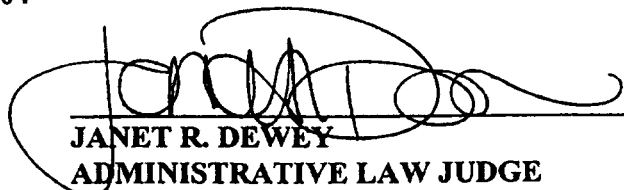
3. SOAH has jurisdiction over all matters relating to the conduct of the hearing in this proceeding, including the preparation of a Proposal for Decision with Findings of Fact and Conclusions of Law in accordance with PURA § 14.053 and TEX. GOV'T CODE ANN. § 2003.049.
4. The designation of a telecommunications provider as an ETC is the responsibility of the Commission. 47 C.F.R. § 54.201(b).
5. Only carriers designated ETCs are eligible for FUSF support. 47 C.F.R. § 54.201(a).
6. Designation as an ETC is contingent upon a finding that the carrier satisfies the requirements of 47 C.F.R. § 54.201(d).
7. CMRS carriers are not required to provide equal access to common carriers for the provision of telephone toll service.
8. P.U.C. SUBST. R. 26.418 incorporates the federal requirements for ETC designation.
9. NPCR is a common carrier as is required by 47 C.F.R. § 214(e)(1) and P.U.C. SUBST. R. 26.418(c), as that term is defined by 47 U.S.C. § 153(10) and 47 C.F.R. § 20.9(a)(7).
10. To be designated an ETC, a carrier must reasonably demonstrate its ability and willingness to provide the services required of an ETC.
11. Requiring carriers to provide the supported services prior to designation as an ETC has the effect of prohibiting the ability of prospective market entrants from providing telecommunications services in violation of 47 U.S.C. § 253(a). Even though such a requirement might be said to apply equally to both new entrants and incumbent LECs, the effect of such a requirement is not competitively neutral and is, therefore, preempted by federal law.
12. Based on Conclusions of Law Nos. 10 and 11, a carrier's designation as an ETC is dependent on offering, rather than providing, the supported universal services. However, demonstration of the capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service.
13. The Commission's analysis of the public interest is guided by the fundamental goal of preserving and advancing universal service, and the component goals of ensuring the availability of quality telecommunications service at just, reasonable, and affordable rates, and the deployment of advanced telecommunications and information services to all regions of the nation, including rural and high cost areas.

14. 47 U.S.C. § 332(c)(3)(A) prohibits a State from regulating the entry or rate charged by any commercial mobile service, such as CMRS, with limited exception.
15. NPCR is not subject to quality of service or consumer protection rules identified in P.U.C. SUBST. R. 26.417.
16. NPCR is not subject to the consumer protection rules identified in P.U.C. SUBST. R. 26.21(a)(2).
17. Based on the above findings of fact, NPCR satisfies the federal and state requirements for designation as an ETC in the study areas served by the following rural telephone companies: Tatum Telephone Company, Blossom Telephone Company, Etex Telephone Cooperative, Inc., Cumby Telephone Cooperative, Inc., and Comanche County Telephone Company, Inc.
18. Based upon the above findings of fact, NPCR failed to satisfy the federal and state requirements for designation as an ETC in the study areas served by the following rural telephone companies: Valley Telephone Cooperative, Inc., Border to Border Communications Inc., Riviera Telephone Company, Inc., Alenco Communications, Inc., Cameron Telephone Company, LaWard Telephone Exchange, Inc., Ganado Telephone Company, and United Telephone Company of Texas, Inc. d/b/a Sprint.
19. Based upon the above findings of fact, NPCR failed to satisfy the federal and state requirements for designation in the service area of Verizon, which is comprised of 44 non-rural exchanges

C. Ordering Paragraphs

6. NPCR's application is approved in part in accordance with the above findings of fact and conclusions of law.
7. All other motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief, if not expressly granted herein, are denied.

SIGNED March 23, 2004



JANET R. DEWEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS